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NOTE.—The "Supp. to Brief," quoted within, is the pamphlet entitled "Legislative Enactments and Judicial Opinions."

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Supreme Court of the United States.

PATRICK KIERNS, as Executor, &c.,
Plaintiff-in-Error,

against

THE NEW YORK AND HARLEM RAILROAD COMPANY and THE NEW YORK CENTRAL

and

HUDSON RIVER RAILROAD COMPANY,
Defendants-in-Error.

October Term, 1904.
No. 203.

BRIEF FOR DEFENDANTS IN ERROR.

Statement of Fact.

This is a proceeding by writ of error to the Supreme Court of the State of New York, allowed by his Honor, Chief Judge Alton B. Parker (page 69), to review a final judgment of and rendered and entered by that Court at a Special Term thereof, dated March 31, 1903 (page 62), upon and in conformity with the remittitur of the Court of Appeals, dismissing the complaint of the plaintiff upon the merits.

THE COMPLAINT.

The action was commenced September 23, 1897 (page 2), and plaintiff Kierns in and by his complaint therein (page 3), alleged ownership since *April 12, 1882*, of therein described premises, situate at

the southeasterly corner of Park Avenue and 114th Street, having a width of 17 feet 5 inches on the street and a depth of 100 feet 11 inches upon the avenue; that the avenue is, and has been, since prior to 1870, a public street, established by proceedings under Chapter 86 of the Laws of 1813 and amending acts; that he, as appurtenant to his said premises, has rights and easements therein; that defendant Harlem Company is the owner, and Central Company is, and since April, 1873, has been, the lessee of the described railroad and railroad structures which were operated by steam by the Harlem Company prior to 1873 and by the Central Company since that time; that, subsequent to said lease, defendants, without right or authority as against plaintiff or his predecessors in title, excavated in Park Avenue in front of said premises and constructed in the cut or depression thus formed with masonry a wall extending above the surface of the avenue, the railroad which they have maintained and operated by steam engines for more than six years last past; that in or about April, 1893, defendants commenced, and have since continued, the construction of a permanent elevated railway structure, supported by columns of iron and steel, standing on pedestals of masonry imbedded in the soil of said avenue; that this structure substantially and materially interferes with and impairs the easements of light, air and access appurtenant to said premises; that the maintenance and use of this structure constitutes a trespass upon plaintiff's said easements, which will be constant and continuous; that the said acts of the defendants have been, are and will be, without warrant of law, without his consent, and that to prevent multiplicity of suits he invokes the equitable interference of the Court, and prays damages for the trepasses committed and an injunction restraining the further maintenance and operation of the elevated road in front of his premises.

ANSWER.

The answers of the defendant railroad companies (page 6), *inter alia*, denied that they had built, or were building, or intended to add to or complete, the elevated railroad structure; admitted ownership and lease of and previous maintenance and operation of the railroad and the purpose and intent to operate it on the elevated structure upon its completion; and further alleged:

That pursuant to the act of 1807 a map or plan of public streets was filed April 1, 1811, exhibiting Fourth Avenue of the width of one hundred feet. That by the act of 1831 the N. Y. & Harlem R.R. Co. was incorporated to construct a railroad within the bounds and between the termini named, and in pursuance thereof located its road and made and duly filed a survey and map thereof, which, by resolution of October 22, 1831, was duly approved by the proper city authorities, which road, as located, occupied a twenty-four foot strip of land having its center line coincident with the center line of Fourth Avenue, as exhibited on said city map.

That by ordinance of December, 1831, the city council granted permission for the building of the road upon conditions which were agreed to by and between the city and the railroad company of date January 9, 1832. That thereafter the railroad company *acquired title to the said twenty-four strip of land* extending from Harlem River to Forty-second street, including that *in front of plaintiff's described premises*, with the power of *sloping embankments or excavations the full width of the avenue*, and many years prior to the city's acquirement of title to the avenue the railroad company had its road constructed and in operation upon the said strip of land and so continued until the changes required by the acts of 1867 and 1872, respectively, were successively made. That by reason of the existence of the railroad, and in pursuance of the

memorial of the Mayor, etc., the act of 1837 was passed altering the city map by adding twenty feet upon either side of this avenue.

That the railroad company's *acquirement of its said title and building of its road* was many years prior to plaintiff's acquirement of title, if he has any, to the premises described, all in pursuance of said act of incorporation and with the acquiescence of plaintiff's predecessors in title. That in pursuance of the act of 1848 the New York and New Haven (now New York, New Haven and Hartford) Railroad Company in that year acquired from the Harlem Company the right to run its trains over this portion of said railroad, which it has ever since done and is now doing. That by proceedings instituted in 1850 under and in pursuance of and subject to all of the acts, ordinances and agreements relating to the said Fourth avenue, and to the said railroad therein and resulting in an order of confirmation entered in October, 1853, the city of New York assumed to acquire title to the land within the lines of said avenue, from Thirty-eighth street to the Harlem river, subject, nevertheless, to the right of the Harlem Company, its successors and assigns, to maintain and operate its said railroad therein conformable to lawful public regulation. That by the act of 1872, as and by way of eliminating grade crossings and otherwise improving the avenue, a prescribed statutory grade of the railroad from Forty-fifth street to the Harlem river was provided and established, and provision made for viaducts and over and under crossings, all whereof was carried out and maintained and used thenceforth, and still is. That in April, 1873, the railroad was leased to the Central Company, which entered thereunder, and is now in sole possession thereof. That on April 19, 1892, the Legislature passed an Act entitled "An Act to regulate, improve and enlarge Park Avenue above 106th Street," etc., known as Chapter 339 of the Laws of 1892, and which act has been duly

amended by Chapter 548 of the Laws of 1894, Chapter 594 of the Laws of 1896, and Chapter 613 of the Laws of 1898.

That under and pursuant to section 13 of the Act of 1892 the board therein designated was appointed and organized and thereupon took entire charge of and proceeded in the execution of the work prescribed by said act, and in that behalf made sundry contracts whereunder all requisite structures, both permanent and temporary, have been and are being constructed under the sole supervision of said board and in part at the expense of the city of New York and thereby the provisions of the said act have been carried out and executed.

That all the said changes that have been made were necessary to carry out the provisions of the said acts and necessary to carry into effect the therein prescribed enlargement and improvement of the avenue.

Also pleaded the statutes of limitations and *adverse possession for a period of more than twenty years* (pp. 6–13).

The Trial.

Upon the trial of the issues thus joined plaintiff gave evidence (pp. 21–37) to prove his title to the described premises, and the measure of damages to the usable and fee value thereof claimed by him to be ascribable to the maintenance and use of the railroad structure and train operation; and defendants (pp. 36–46) gave evidence tending to prove the public and *private* consents, agreements, *grants*, and users as *alleged in their said answer*, under all of which they claimed the right as against plaintiff to possess and use the previously and then existing railroad structure and to maintain their train operations thereon.

The general history of the avenue and railroad as presented by the proofs of the parties is in all respects so substantially identical with that presented by the Muhlker

case, recently considered by this court, as to render unnecessary its repetition here.

The original two-track railroad at this point, as maintained and operated from in or about 1835 until the changes made under the act of 1872, was proximately *fifteen feet above* the general surface of the ground, and of the grade of the street after the street was opened in or about 1853 (Defts. Ex. 14, p. 56).

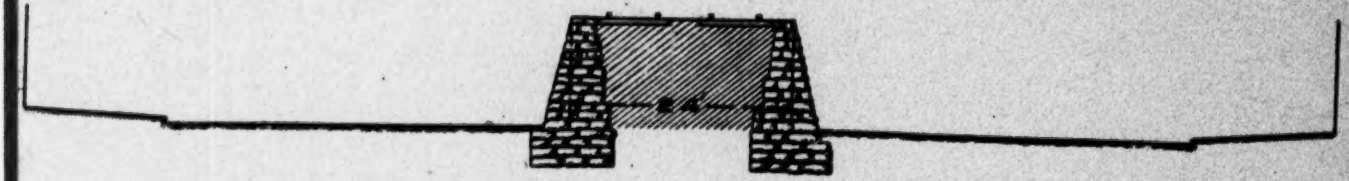
[See opposite page.]

The relative positions of the former four-track railroad structure, and the present one, and that the latter is *clearly within the lines of the former*, are shown by Plaintiff's Exhibit S (page 46). The 1872 structure was bounded upon each side by solid walls ten to *twelve feet in height* above the surface of the avenue and prevented a thoroughfare across the avenue at 114th Street (page 32).

The proofs as to the title of the parties respectively and of the character of railroad structure maintained and used from in or about 1872 until the changes under the enactment of 1892 are, in the main, sufficiently presented by the "Third" and "Fourth" paragraphs of the decision of the trial court, which are as follows:

> "THIRD.—Said railroad prior to August, 1894, "was operated along the centre of said avenue in "front of the plaintiff's premises, on a masonry em- "bankment or viaduct about 3 feet high and about "56 feet wide, and bounded on both sides by parapet "walls of stone, having a height of about 5 feet above "the surface of said avenue.
>
> "FOURTH.—The said defendant railroad companies, "under and by virtue of the charter of the defendant "The New York & Harlem Railroad Company and "the acts amendatory thereof and supplemental "thereto, the various resolutions, consents, ordinances "and acts of the Mayor, Aldermen and Commonalty "of the City of New York, the proceedings taken "by the Mayor, Aldermen and Commonalty of the

SECTION OF PARK AVENUE,
Across south line of 114th. Street,
showing railroad structures from 1872 to 1897.
(see Defendants Exibit 14, between pages 56 & 57.)



SECTION OF PARK AVENUE
Across south line of 114th. Street,
showing railroad structures from 1836 to 1872.
(see Defendants Exibit 14, between pages 56&57.)

"City of New York, commenced in 1850 and con-
"consummated in 1853, the various acts of the Leg-
"islature upon which said proceedings were taken to
"open Fourth (now Park) Avenue from 38th Street
"to 135th Street, Chapter 702 of the Laws of 1872,
"and the acts performed by the defendants thereun-
"der; the lease of The New York & Harlem Railroad
"Company to The New York Central & Hudson River
"Railroad Company, dated April 1st, 1873, and all
"acts of acceptance, user and occupation on the part
"of the defendant railroad companies, and the lapse
"of time and the acquiescence of the plaintiff or his
"predecessors in title, *acquired the right*, without
"liability to the plaintiff, to have, maintain and use
"their railroad and railroad structures as the same
"were maintained and used prior to August, 1894, as
"hereinbefore described."

[See opposite page.]

The evidence to which that finding is imputable is that the railroad company *acquired that right*, not under a deed supposedly lost and granting or purporting to grant the measure of property right exercised, but *under the deed in evidence* specifically authorizing an elevated railroad with the slopes of its embankments occupying the full width of 100 feet.

The location and character of the temporary trestle structure upon which trains were operated during the work of changing the permanent structure in the avenue opposite these premises is shown by defendant's Exhibit 15 (page 57) and described in the decision paragraph "Fifth" (page 16), as follows:

"During the said time, from October 1st, 1894, to
"September 6th, 1897, the trains of the defendant
"The New York Central and Hudson River Railroad
"Company were operated upon temporary structures
"or trestles erected partly over said embankment or
"viaduct and partly between the same and the curb-
"line of said Park Avenue roadway and occupying
"said roadway between plaintiff's premises and said
"old viaduct or embankment."

The judgment directed and entered was that the plaintiff recover the sum of $1,296 damages and the interest thereon and costs, amounting in the aggregate to $1,639.32, and "that the defendants above named be and they hereby are enjoined and restrained from the further maintenance and operation of their viaduct structure and railroad in front of the plaintiff's premises on the southeast corner of Park Avenue and 114th Street" unless they pay to plaintiff $2,525 for a grant or release of the easements appropriated.

The plaintiff did not except to the above decision nor appeal from the judgment, and hence, in so far as the findings of the trial court are adverse to his contention, they are binding upon him.

The defendants appealed, and upon the review of the judgment in the Supreme Court, Appellate Division, the judgment was in all things affirmed, but by a divided court (page 58), and from this the defendants appealed to the Court of Appeals, with the result that the latter court ordered and adjudged reversal of the judgment and dismissal of the plaintiff's complaint on the merits and remitted the case to the Supreme Court (page 2), wherein judgment was entered accordingly on the said remittitur (page 62).

The matters relied upon for the proceeding in this Court appear in and by the remittitur as aforesaid issued by the Court of Appeals to the Supreme Court (page 1), to wit:

> "That in said suit or action there was drawn in question the validity of Chapter 339 of the Laws of 1892 and the acts amendatory thereof, and of the authority exercised thereunder, on the ground of their being repugnant to the Constitution of the United States, and particularly to Section 1 of Article 14 and the amendments thereto, and of Section 10 of Article 1 thereof, and thereupon the decision of this Court of Appeals was and is in favor of the validity of said statute and of the authority exercised thereunder."

The Acts of 1892 and 1901.

On the 19th of April, 1892, the Harlem Company was in full life and being, and of the age of something more than sixty years. The New York Central and Hudson River Railroad Company was also in full life and being, and of *the age of something more than twenty years.* During all their lives it had been *one of the conditions of existence* for both of them that when, for any necessary purpose, they took any "real property" belonging to anyone, they must pay for it—and pay for it *before the taking.* By the 19th April, 1892, these provisions had become embodied in the Railroad Law of the State (Chap. 565, Laws 1890), and the Code of Civil Procedure of the State (Chap. 448, Laws 1876). As then existing these provisions were, and still are, as follows:—

Railroad Law of New York.

"ACQUISITION OF TITLE TO REAL PROPERTY.

"§ 7. All real property, *required by any railroad corporation for the purpose of its incorporation,* shall be "deemed to be required for a public use. If the corporation is unable to agree for the purchase of any real "property, or *of any* right, interest or *easement therein,* "required for such purpose, or if the owner thereof shall "be incapable of selling the same, or if after diligent "search and inquiry the name and residence of such "owner cannot be ascertained, *it shall have the right to acquire title thereto by condemnation.* It shall also "have such right in the following cases:

"1. Where title to real property has been acquired, "or attempted to be acquired, and has been found to be "invalid or defective.

"2. Where its railroad shall be lawfully in possession "of a lessee, mortgagee, trustee or receiver, and additional real property shall be required for the purpose of "running or operating such railroad.

"3. Where it shall require *any further rights to lands or the use of lands* for switches, turnouts or for filling

"any structures of its road, or for constructing, widen-
"ing or completing any of its embankments or roadbeds,
"by means of which greater safety or permanency may
"be secured, and such lands shall be contiguous to such
"railroad and reasonably accessible to the place where
"the same are to be used for such purpose or purposes.

"4. Where it shall require any further right to lands
"or to the use of lands for the flow of water occasioned
"by railroad embankments or structures now in use, or
"hereafter rendered necessary, *or for any other purpose*
"*necessary for the operation of such railroad*, or for
"any right to take and convey water from any spring,
"pond, creek or river to such railroad, for the uses and
"purposes thereof, together with the right to build or
"lay aqueducts or pipes for the purpose of conveying
"such water, and to take up, relay and repair the same,
"or for any right of way required for carrying away or
"diverting any water, stream or floods from such rail-
"road for the purpose of protecting its road *or for the*
"*purpose of preventing any embankment, excavation or*
"*structure of such railroad from injuring the property*
"*of any person who may be rendered liable to injury*
"*thereby.*

"Waters commonly used for domestic, agricultural or
"manufacturing purposes shall not be taken by condem-
"nation to such an extent as to injuriously interfere with
"such use in future. No railroad corporation shall have
"the right to acquire by condemnation any right or ease-
"ment in or to any real property owned or occupied by
"any other railroad corporation, except the right to
"intersect or cross the tracks and lands owned or held
"for right of way by such other corporation, without
"appropriating or affecting any lands owned or held for
"depots or gravel-beds."

Code of Civil Procedure.

"Sec. 3359. WHEN PROCEEDINGS PRESCRIBED IN THIS TITLE TO BE TAKEN.

"Whenever any person is authorized to acquire title to
"real property, for a public use *by condemnation*, the pro-
"ceeding for that purpose shall be taken in the manner
"prescribed in this title."

By sections 3360 to 3374 inclusive "the manner prescribed in this title" is detailed, and is a regular action in the Supreme Court—the only court of *general* jurisdiction in New York, and ending in a judgment.

By Sec. 3375 possession of the property taken can only be had after payment of the compensation awarded by the judgment.

Always as long as those two corporations had lived the *lines* of their railroads had been prescribed *by law* and from time to time changed by *law*. As originally made, those lines must, of course, have passed entirely upon the lands of *other people*—lands not their own—but which they were bound as one of the conditions of their existence to *take* and *pay for*—*pay* for *before* the taking and at the end of a *regular* proceeding—in a *regular* court of *full* jurisdiction into which the owner of the thing taken was regularly brought.

In this condition of things the Act of 1892 was passed. This act, so far as those two companies were concerned, *changed* a portion of their line and required them to run upon a new line—*partly, at any rate, then the property of others.*

By it the State built an elevated structure, which it paid for itself, getting the money for it by its power of taxation, one half from the defendants and the other half from the city of New York; and it commanded and compelled the defendants to put their railroad upon it and run it there, instead of where it had been before. That this was not in the interest of the defendants, but solely in the interest of the public, was held by the Court of Appeals, and is shown by this, that the command of the Congress to have the bridge over the Harlem River raised, required

the change of the former line from 129th Street to the north, *but no other change.* What the act did, however, was to give a much worse railroad line than before. The railroad was required to ascend from 106th Street to 116th Street (one-half mile) at the rate of 40 feet to the mile, and then to *descend* from 116th Street to 129th Street (rather more than a one-half mile), at the rate of 29.6 feet per mile. In other words, the net result to the railroad companies was that they had to pay something like a million of dollars *for the privilege of climbing over a bad hill.* (Section 1, Act 1892; Supp. to Brief, 16.)

The State built the structure and, as has already been said, by its power of taxation it collected the money which the building of it cost, one-half from the railroad companies and the other half from the city of New York.

The railroad companies, as they were commanded by that act to do, put their railroad upon the top of it, and have been running it there since. If they had not obeyed the command, they could not only not have got to their station in the city of New York, but their lives could have been ended.

Certain suits were then brought against them, this one among others; were determined in the Supreme Court of New York in favor of the respective plaintiffs, and went to the court of appeals.

On the eleventh of May, 1901, New York, by her legislature, passed an act which is chapter 729 of her laws of that year, and which will now be copied.

At that time there were before the court of appeals of New York cases, like this one—the *Welde* and *Fries* cases. In the following October those cases were decided against *Welde* and *Fries*, reversing the judgments below, and dismissing the action. (Supp. to Brief, 92, 97.)

We now give the act of 1901.

ACT OF 1901.

CHAP. 729.

"AN ACT conferring jurisdiction upon the court of claims
" to hear, audit, and determine the alleged claims of
" certain owners of real property in New York city
" for damages alleged to have been caused to said
" property by the operations carried out pursuant to
" chapter three hundred and thirty-nine of the laws
" of eighteen hundred and ninety-two.

Became a law, May 11, 1901, with the approval of the Governor. Passed, three-fifths being present.

"The People of the State of New York, represented in " Senate and Assembly, do enact as follows:

"SECTION 1. Jurisdiction is hereby conferred upon the " court of claims to hear, audit, and determine the alleged " *claims* of persons who now own or heretofore have owned " *real property abutting on Park avenue*, in the Borough " of Manhattan, city of New York, between One Hundred " and Sixth street and the Harlem river, or the heirs, ex- " ecutors, administrators, or assigns of said persons, *for* " *damages* alleged to have been *caused to said property by* " *the acts and operations performed and carried out*, pur- " suant to chapter three hundred and thirty-nine of the " laws of eighteen hundred and ninety-two, and the acts " amendatory thereof and supplemental thereto, *in so far* " *as said acts and operations were performed or carried* " *out by, or under the direction or superintendence of, the* "*public board created by said act*, namely, the board for " the Park avenue improvement above One Hundred and " Sixth street, and the court of claims is authorized to " make awards and to render judgments therefor against " the state and in favor of said claimants; provided, how- " ever, that this act shall not be construed as conferring " upon the court of claims jurisdiction to award *any dam-* " *ages for which any railroad corporation or corpora-* " *tions may, either at law or in equity, be liable.*

"SECTION 2. No award shall be made or judgment ren- " dered herein against the state unless the facts proved " shall make out a case against the state, which would

"create a liability were the same established in evidence "in a court of law or equity against an individual or cor- "poration; and in case such liability shall be satisfactorily "established, then the court of claims shall award to the "claimants such sums as shall be just and equitable, and "shall render judgments for the same, notwithstanding "the lapse of time since the accruing of damages, pro- "vided the said claims are filed with the court of claims "within one year after the passage of this act.

"SECTION 3. This act shall take effect immediately."

In the following year the *Muhlker* case was decided, and the court of appeals of New York, speaking by its Chief Judge, then said (Supp. to Brief, 102): "Undoubt- "edly the state had also the power to provide in the act "for compensation to abutting owners, and to apportion "the expense incurred in the acquisition of the easements "destroyed upon the defendants and the city of New "York, as it apportioned the expenses of building the "viaduct and making the other changes in the street; "and it still has the power to authorize ascertainment of "the damages to the abutting owners through its Court of "Claims and to provide for their payment, *and it may* "*well be that it would be equitable for it to do so.*"

It is to be observed that under those acts the court of appeals of New York held the defendants liable for all obstructions to light and air by the building of *stations* (*Dolan* case, Supp. to Brief, 120).

THE FEDERAL QUESTIONS.

The plaintiff in error contended in the court of appeals of New York that the act of 1892 "*and the authority* "*exercised thereunder*" were repugnant to the Constitution (R. 1.)

FIRST POINT.

The plaintiff in error having taken his title before the first of the Elevated Railroad cases has no easement and no case.

The Title.

This case differs from the *Muhlker* case in the following particular:

The plaintiff in error. *Kierns* obtained his title by deed on the twelfth of April, *1882* (R., 36).

This is the evidence. The finding of fact is (R., 25): "The plaintiff is and since April 12, 1882, has been the "owner and in possession of the premises described in "the complaint."

The *Story* case was decided on the *seventeenth of October*, 1882 (*Story* v. *N. Y. El. R.R. Co.*, 90 N. Y., 122, 124).

The only decisions in the courts of New York which were then in force—upon this matter—were the *Kerr* case (People *v.* Kerr, 27 N. Y., 188), and the decision of the Court below in the *Story* (3 Abb. N. C., 478), *and these* are decisions which are to be read into his contract.

SECOND POINT.

The Act of 1892 is not repugnant to the Constitution.

It is to be observed that the Court, in its opinion in the *Muhlker* case, has not *said* that the act of 1892 was repugnant to the Constitution. The opinion does not discuss that matter at all.

In the court of appeals of New York both dissenting judges agreed that the act was constitutional (Supp. to Brief, 109, 116), Judge Cullen saying: "The statute "would simply be inoperative until the company acquired "the necessary land."

I.

The act does not *forbid* compensation nor the giving of notice to the plaintiff.

It does not repeal the Railroad Law. If it did, the effect would be only to revive the old charters of the two companies, which contain the same commands for compensation and notice, with a statement that the act does *not* provide for compensation, *and* does *not* provide for notice—the appropriate answer to both of which statements is to *deny the fact*, and then they devote about 50 pages of print each to showing that plaintiffs have an easement.

Read together with the Railroad Law and the Code of Civil Procedure of New York it not only provides for, but *compels* compensation for the taking of any "easement," and ample notice for the fixing of that compensation.

Read in connection with the law of 1901 it gives payment, *from the treasury of the state*, for all *damages* caused to abutting property by the "acts and operations" of the board created by that act.

The word damages, as the Court has held in *Chicago* v. *Taylor* (125 U. S., 161), and several times since, means the

lessening of the value of the abutting property, which is much more than the plaintiff in error gets by the judgment below, *because* he gets only the lessening of value caused by the loss of *light* and *air*, in other words, *nothing for the running of the trains.*

We challenge counsel to put together ANY *words* which will better give compensation or better give notice.

The act of 1892 was, we submit, certainly not repugnant to *any* part of the Constitution.

And counsel seem to apprehend that condition of things, for ~~they~~, in their brief, they rely, not so much upon the *act* being repugnant to the Constitution, but upon the authority "exercised thereunder" being repugnant to the Constitution.

The phrase of the Constitution is this: No state shall "*pass* any *law* * * * impairing the obligation of con-"tracts."

It is plain that the act of 1892, read in connection with the railroad law; the code of civil procedure and the act of 1901, does *not* impair the "obligation" of any "contract," and, of course, no "authority exercised thereunder" can do so.

That is not the question, although that is the only question which they can raise, *since that is the only question which they raised below.*

The question, as we understand it, is this:

There is a dispute between two beings—human or artificial, it does not matter—about the ownership of a piece of land, or a trespass upon a piece of land. The common law, of course, requires the being in possession of the piece of land to give it up to the true *owner*, and the being who committed the trespass to pay for it to the *owner;* but of course the person who *claims* to be owner, must show that he *is* the *owner*. And thus arises a controversy as to the ownership of the land; but that controversy can never, we submit, come to the Court.

Suppose, now, that a state makes a statute simply declaratory of the common law in this respect. That statute is certainly *not* repugnant to the Constitution. *But does it bring every dispute as to ownership of land to the Court?* Is every railroad act, general and special, repugnant to the Constitution, because there may be a dispute between the railroad company and someone else as to which of them owns a piece of land? Such disputes are common enough. Of course this is a holding either that the Railroad Law of New York *and about every railroad charter in the country is repugnant to the Constitution and void.*

In that event, of course, the plaintiff cannot recover anything but damages for the trespass. The act being void, the railroad companies cannot use the right of eminent domain to take the easements and land necessary for the structure, and consequently the plaintiff cannot recover for their permanent appropriation.

What the Court has just held in the *Muhlker* case is, as we respectfully submit, *not* that the act of 1892 was repugnant to the Constitution, but that the *decision of the court of appeals of New York was repugnant to the constitution.*

Of course there is not any such question here, since no such question was raised below.

THIRD POINT.

A change of judicial decision is not the passage of a law impairing the obligation of a contract, within the meaning of those words as used in the Constitution.

In Yazoo and Mississippi Railroad Company *v.* Adams, 180 U. S., 41, the Court, speaking by Mr. Justice Brown, said:

(p. 44.) "There is no doubt of the general proposition "that, where a contract is alleged to have been impaired "by subsequent legislation, this court will put its own "construction upon the contract, though it may differ "from that of the Supreme Court of the state. The authori- "ties upon this point are very numerous, but they all "belong to a class of cases in which it was averred that, "properly construed, the contract was impaired by sub- "sequent legislation; but, if the sole question be whether "the Supreme Court has properly interpreted the con- "tract, *and there be no question of subsequent legislative* "*impairment*, there is no Federal question to be answered. "*Lehigh Water Co.* v. *Easton*, 121 U. S., 388.

"To sustain our jurisdiction under the second clause of "Rev. Stat., sec. 709, relied upon here, there must be "drawn in question the validity of a state statute upon "the ground of its being repugnant to the Constitution "or laws of the United States; but of what state statute "is the validity attacked in this case? None is pointed "out in the record; none set up in the pleas; none men- "tioned in the opinion of the court."

And at page 46: "Three recent cases in this court are "pertinent in this connection. In *Central Land Co.* vs. "*Laidley*, 159 U. S., 103, an action of ejectment was "brought by Laidley against the land company in a court "of West Virginia. The case turned upon the defective-

"ness of a wife's acknowledgment to a deed of land. The "Court of Appeals of Virginia, prior to the organization of "the State of West Virginia, had in several cases held that "acknowledgments in this form were sufficient; but the "Court of Appeals of West Virginia in this case held it to "be insufficient, and the change of the settled construction "of the statute was charged as an impairment of the con- "tract. This court held that under the contract clause of "the Constitution, not only must obligation of the con- "tract be impaired, but it must have been impaired "*by some act of the legislative power of the State, and* "*not by decisions of the judicial department only.*"

In this same case of *Central Land Company* v. *Laidley* (159 U. S., 103), the Court said (p. 110, 111):

"The same doctrine was stated by Mr. Justice Harlan, "speaking for this court, as follows: 'The state court may "erroneously determine questions arising under a contract "which constitutes the basis of the suit before it; it may "hold a contract void which, in our opinion, is valid; it may "adjudge a contract to be valid which in our opinion is "void; or its interpretation of the contract may, in our "opinion, be radically wrong; but, in neither of such cases, "would the judgment be reviewable by this court under "the clause of the Constitution protecting the obligation "of contracts against impairment by state legislation, and "under the existing statutes defining and regulating its "jurisdiction, *unless that judgment, in terms or by its* "*necessary operation, gives effect to some provision of the* "*state constitution, or some legislative enactment of the* "*State* which is claimed by the unsuccessful party to im- "pair the obligation of the particular contract in ques- "tion.' *Lehigh Water Co. v. Easton*, 121 U. S., 388, 392.

"Many other decisions of this court to the same effect "are cited in that case. See also *New Orleans Waterworks* "*v. Louisiana Sugar Co.*, 125 U.S., 18, 30; *St. Paul &c.*,

"*Railway v. Todd County*, 142 U. S., 282; *Brown v.* "*Smart*, 145 U. S., 452; *Wood v. Brady*, 150 U. S., 18."

And in the same case, is also said:

Page 110:

"It was said by Mr. Justice Miller, in delivering a "later judgment of this court: 'We are not authorized "'by the Judiciary Act to review the judgments of the "'state courts because their judgments refuse to give "'effect to valid contracts, or because those judgments, "'in their effect, impair the obligation of contracts. If "'we did, every case decided in a state court could be "'brought here, where the party setting up a con-"'tract alleged that the court had taken a different view "'of its obligation to that which he held.'" *Knox* v. *Exchange Bank*, 12 Wall., 379, 383.

FOURTH POINT.

The question of the construction of the contract is, therefore, not in the case.

The Court takes jurisdiction of the matter of the construction of the contract, solely to determine whether the statute in question "impairs its obligation" (*Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 443). But here is a case where it does not make any difference *which way the contract is construed*, because the statute is not repugnant to the Constitution *in either event*. If the construction is in the *favor* of the plaintiff in error *the statute pays him*. If it be against him, of course he is also paid for whatever he has.

We submit that until the statute is held to be repugnant to the Constitution, there is no question as to what the contract means.

In this case, as we submit, the result is as follows:

The Court takes jurisdiction because of the claim that the Act of 1892 is repugnant to the Constitution. The Court *admits*, in its opinion, by not asserting the contrary and by *not* at all discussing the question *that the Act of 1892 is* NOT *repugnant to the Constitution.*

Nevertheless, it reverses the judgment, upon a question of which, if the Act of 1892 be constitutional, it has no jurisdiction.

See the consequences. Anybody who wants to make a claim against any railroad company simply alleges that the *Railroad Law* is repugnant to the constitution—and upon that allegation brings the case here to the Court. Of course, the Court immediately determines that the Railroad Law is not repugnant to the constitution. Nevertheless it decides the case and reverses the judgment, upon the matter of the simple claim for money.

FIFTH POINT.

Upon the construction of the Acts of 1892 and 1901, read together with the Railroad Law and the Code, the decision of the Court of Appeals of New York is conclusive and will be followed by the Court.

By the Act of 1901, the State is to pay, *provided* the railroad companies are *not* liable. The plaintiff gets his money in any event.

Upon that question as to *which, under New York's own statutes,* PAYS, surely the court of appeals of New York is the proper tribunal to decide.

SIXTH POINT.

The person who did the damage and got the benefit in this case was New York—the State.

Assuming the broad principle, that where any property is taken or *damaged* for a public use it ought to be paid for, we say, *first*, that it is fair that the person who pays for it should be the person who *gets the benefit*, or, at any rate, the person who *does the damage*.

We are neither the one nor the other. The courts below have so found.

It has been found by the trial court and held by the court of appeals that the state made the structure. This is the only thing which obstructs the light and air, and it is only for light and air that the plaintiff in error recovered.

For this, by the act of 1901, New York pays from her own treasury.

> The Court has said in its opinion, that the State by building the structure and then making the railroad companies pay for it, does only by *two* acts what it could have done by *one*, but this can hardly mean that one who is *taxed* and *pays* the tax, is liable for any damages caused by the use of that money by the sovereign to which the money was paid. They—the railroad companies—were compelled to pay but half of the tax—are they then liable for one half of the damage to the plaintiff in error or have they a remedy over against the city of New York for the other half?

Under the opinion of the Court in the *Muhlker* case all the decisions of the court of appeals of New York down to the time of Moore's deed, go into the contract.

These cases, as we submit, hold as follows:—

The legislature, where the fee of a highway is *not* owned

by the abutter, has a right to put a railroad upon it and have that railroad run, without being liable to the abutter. *People* v. *Kerr*, 27 N. Y., 188. This being so, it can put it upon the top of a structure in the street just as well as upon a surface. Even though that structure be unlawful, and take away the abutter's light and air, *the running of the railroad is lawful.* In other words, the plaintiff can recover for the structure, but not for the running of the railroad. This was, we submit, held in the *Story* case. The opinions in that case, carefully distinguishing between the structure and the running of the trains, limiting what is said by the court to the *structure* and expressly and carefully stating that the court did not intend to overrule *People* v. *Kerr*, 28 N. Y., 188, and *Kellinger* v. *Forty-second street R.R. Co.*, 50 N. Y., 206 (Story v. N. Y. El. R.R. Co., 90 N. Y., 122, 146, 155, 159, 160, 161, 169–170).

And it is upon this ground that no recovery is allowed for *noise* in the elevated railroad cases.

A. B. N. Co. *v.* N. Y. E. R. Co., 129 N. Y., 252, 273.

Bischoff *v.* N. Y. E. R.R. Co., 138 N. Y., 257, 263.

The People v. *Kerr*, 27 N. Y., 88, was to restrain the defendants from putting a railroad upon the Seventh avenue in New York. It was brought by the people—and abutting lot owners—and the city was also made a party and took the plaintiffs' side of the case. It was proved, and the trial court found, that the title of the city to the Seventh avenue came, as to a part of it, from condemnation proceedings taken under the act of 1813, already referred to as considered in the elevated railroad cases, and that part was held by the city "in trust, nevertheless, that the same be appropriated and kept open as "public streets forever, and in like manner as the other "public streets in said city are or ought to be."

That as to the rest of the Seventh avenue the city had title, in fee simple, by deeds which expressed the grant to be upon the "*trust that the same be left open as public "streets for the use and benefit of the inhabitants of "said city forever.*" The finding of the trial court has already been quoted—that the railroad "would be a "material interference with, and injury to the use and "enjoyment of the lots fronting" on that street "to "such an extent that the same would constitute a con- "tinuous private nuisance to the owners and occupants "thereof, but for the act of the legislature authorizing "the construction of said road," and there was evidence, not denied, that the value of property "would be depre- "ciated 20 to 25 per cent. should the railroad go into "operation" (Appeal Book, fol. 232; Court of Appeals cases, Bar. Asso. vol. 10 of 1863), and the court, speaking by Mr. Justice Emott, said:

(p. 199) "This is a trust for the benefit of the "public, not of the adjacent proprietors alone, nor "of the inhabitants or citizens of New York alone, "but of the whole people." * * * "The title "thus vested in the city of New York is as "directly under the power and control of the "legislature, *for any public* purposes, as any prop- "erty held directly by the State, or by any public "body or officer." And at page 194: "If the "legislature or municipal authorities, under their "sanction, should construct such a track in a par- "ticular street or road, and while allowing all per- "sons to use that track freely with vehicles adapted "to it, should close the road to every other kind "of travel or use, it would, nevertheless, continue "to be a highway and devoted to a public use. "It is equally so, although its use is restricted to "the vehicles of particular individuals, as for in- "stance of a class of persons licensed to transport "persons or property, or of a corporation having such "privilege or authority, provided, these vehicles are "open to the public under proper regulations, and

"may be used by any and every person without "restriction or limitation, except compensation to "the owners of the vehicle." (p. 193) "Even though" "(it) * * * should be an interference with and injury to "the use and enjoyment of the lots fronting on such "streets, to such an extent that it would be a con- "tinuous private nuisance, if it were not authorized "by law, yet the statute granting such authority is "not unconstitutional, or invalid, because it does "not require compensation for this injury to the "owners of such property." (p. 195) "We are "brought to the simple question, whether, in "constructing and using a railway track with city "cars for passengers, through or over the streets "enumerated in this complaint *the defendants will* "*actually appropriate any property* either of the "City of New York or *of the individual plaintiffs.* "*If property of the latter is taken without com-* "*pensation, even for a public use, the statute is in* "*conflict with the constitution;* and the remedy "sought by them in this action is obviously just and "appropriate to prevent a direct invasion of their "own rights." And Judge Wright says the same thing (pp. 210–212).

This case is deliberately approved in all of the elevated railroad cases, and in *Fobes* v. *R. W. & O. R. R. Co.*, 121 N. Y., 505, it was deliberately followed and applied to a steam railroad in the city of Syracuse. In that case there was a finding of fact that the railroad occupied "a portion of the plaintiff's said "easement" (light, air and access), and

And the Court of Appeals of New York, said (p. 517):

"It was not intended in the *Story* case to overrule or "change the law in regard to steam surface railroads. The "case embodied the application of what was regarded as "well established principles of law to a new combination "of facts, such facts amounting, as was determined, to "*an absolute* and *permanent obstruction* in a portion of "the public street, and in a *total* and *exclusive use of*

"*such portion* by the defendant, and such permanent ob-
"struction and total and exclusive use, it was further
"held, amounted to a taking of some portion of
"the plaintiff's easement in the street for the pur-
"pose of furnishing light, air and access to his ad-
"joining lot. This absolute and permanent obstruc-
"tion of the street, and this total and exclusive use
"of a portion thereof by the defendant were accom-
"plished by the erection of a structure for the elevated
"railroad of defendant, which structure is fully described
"in the case as reported. The structure, by the mere
"fact of its existence in the street, *permanently* and *at*
"*every moment of the day* took away from the plaintiff
"some portion of the light and air which otherwise
"would have reached him, and in a degree very appreci-
"able, interfered with, and took away from him his
"facility of access to his lot; such interference not being
"*intermittent and caused by the temporary use of the*
"*street by the passage of the vehicles of the defendant*
"*while it was operating its road through the street*,
"but caused by *the iron posts* and by the *superstruct-*
"*ure* imposed thereon and *existing for every moment of*
"*the day and night. Such a permanent, total, exclu-*
"*sive* and *absolute appropriation* of a portion of the
"street as this structure amounted to, was held to be
"*illegal* and wholly beyond any legitimate or lawful use
"of a public street. The taking of the property of the
"plaintiff in that case was held to follow upon the *per-*
"*manent* and *exclusive nature* of the appropriation by
"the defendant of the public street or of some portion
"thereof. If that appropriation had been held legal,
"any merely consequential damage to the owner of the
"adjoining lot, not having any title to the street, would
"have furnished no ground for an action against the de-
"fendant. It was just at this point that the disagree-
"ment existed between the members of this court in the

"*Story* case. The judge who wrote one of the dissenting "opinions did not think that the facts presented any "different principle from that of an ordinary steam sur- "face railroad operating its road through the streets of "a city under the authority of the legislature and of the "municipality, in a case where the adjoining lot owner "did not own the fee in the street. The character of "the structure, and all the facts incident thereto, were "regarded by him as simply resulting in an additional "burden upon the street, somewhat greater in degree it "is true than a steam surface railroad, but still it was "such a use of the street as the legislature might permit, "and the legislature having in fact granted it such "power, the use of the street was, therefore, legal, and "the defendant was not responsible for the incidental "damage resulting to one whose property was not in "fact taken within the meaning of the constitutional "provision, and the defendant did him, therefore, no "actionable injury. The other dissenting judges were of "the same opinion.

"A majority of the court, however, saw in the "facts existing in that case what was regarded as a "*plain, palpable and permanent misappropriation* of "the street, or some portion of it, to the *exclusive use of* "*the defendant corporation,* and as resulting from it the "court held that there was a taking of property belong- "ing to the plaintiff without compensation, which no "legislature could authorize or legalize. But this "taking, *it cannot be too frequently or strongly* "*asserted, resulted from the* ABSOLUTE, EXCLUSIVE "*and* PERMANENT *character of the appropriation* "*of the street by the structure of the defendant.* "There is no hint in either of the prevailing opinions "in the *Story* case of *any intention to interfere with* "*or overrule the prior adjudications in this state* "*upon the subject now under discussion, as to the steam*

"*surface railroads.* In the *Story* case it was argued "that no real distinction in principle existed between a "steam surface and an elevated railroad resting on such "a structure as was proved in that case. This court, "however, made the distinction, and the two prevailing "opinions are largely taken up with arguments going to "show the distinction was obvious, material and impor- "tant, and was so real and tangible, in fact, as to call "for a different judgment than would have been proper "and appropriate in the case of the ordinary steam sur- "face railroad, such as the *Drake* case was." * * *

I.—IT IS NATURAL AND UNIVERSAL LAW THAT DAMAGES SHOULD BE PAID FOR BY THOSE FOR WHOSE BENEFIT THE DAMAGE WAS DONE. TO THIS PRINCIPLE OF UNIVERSAL LAW THE WORLD IS GRADUALLY WORKING UP.

In the days of the good Queen Bess, if Her Majesty wanted anything Her Majesty *took it*, and paid for it if she so pleased.

In the first Constitution of New York the power of eminent domain is not even mentioned, and it is now mentioned only for the purpose of limitation. All constitutions now contain the provision that private property shall not be taken for the public without just compensation. Some constitutions contain the provision that "private property shall not be taken *or damaged* for "public use without just compensation." The Constitution of New York does not contain the latter provision, nor did it at the time when the elevated railroad cases were passed. It so happened that the damage done by

the elevated railroads to private property was enormous, and since those roads, though for a public use, were run entirely for private profit, it was only fair and just that the damage done should be paid for by the companies—it being elemental that no public improvement should be encouraged or permitted unless it will, at least, pay for the damage which it causes.

That this was the true and sole ground for the elevated railroad cases is said by Court itself, and we now quote its text.

In *Bohm* v. *The Metropolitan Elevated Railroad Company*, 129 N. Y., 576, the Court of Appeals of New York, speaking through Judge Peckham, said (p. 587):

"The plaintiffs own no land in the street. Their own-
"ership of the land is bounded by the exterior lines of
"the street itself. Hence when, under legislative and
"municipal authority, the railroad structure was built,
"it was supposed by many there was no liability to
"abutting owners, because no land of theirs was taken,
"and any damage they sustained was indirect only, and,
"therefore, *damnum absque injuria*. When the courts
"acquired possession of the question, *and it was seen*
"*that abutting land which before the erection of the*
"*road was worth, for instance, ten thousand dollars,*
"*might be reduced to a half or a quarter of that sum*
"*in value, or even rendered practically worthless by*
"*reason of the building of the road*, IT BECAME NECES-
"SARY TO ASCERTAIN IF THERE WERE NOT SOME PRIN-
"CIPLE OF LAW WHICH COULD BE RESORTED TO IN ORDER
"TO RENDER THOSE WHO WROUGHT SUCH DAMAGE LIABLE
"FOR THEIR WORK. It has now been decided that,
"although the land itself was not taken, yet the abutting
"owner, by reason of his situation, had a kind of prop-
"erty in the public street for the purpose of giving to
"such land facilities of light, of air and of access from
"such street. These rights of obtaining for the adjacent

"lands facilities of light, etc., were called easements, "and were held to be appurtenant to the land which "fronted on the public street. These easements were "decided to be property, and protected by the Con- "stitution from being taken without just compensation. "It was held that the defendants, by the erection of their "structure and the operation of their trains, interfered "with the beneficial enjoyment of these easements by the "adjacent landowner, and in law took a portion of them. "By this mode of reasoning, the difficulty of regarding "the whole damage done to the adjacent owner as conse- "quential only (because none of his property was taken), "and, therefore, not collectible from the defendants, was "overcome. The interference with these easements be- "came a taking of them *pro tanto*, and their value was to "be paid for, and, in addition, the damage done the re- "maining and adjoining land, by reason of the taking, "was also to be paid for, and this damage was in reality "the *one* great injury which owners sustained from the "building and operation of the defendant's road. For "the purpose of permitting such a recovery, the taking "of property had to be shown."

But in this instance the defendants are NOT *the parties benefited nor did* THEY *do the damage.*

The facts as to this have been already stated, but the main facts are now re-stated.

The defendants had their tracks upon a solid structure consisting of *the solid earth*—in this place a cut—of course *lasting forever without* repair. They are now upon a bridge of iron and steel—liable to rust and disintegration —and sure to need, in the future, continual and expensive repair, which, though it be that *now* they *do not* and *have not the right* to make, it is quite possible that in the end *they may be compelled to make.*

They had a level line. They now have to climb over—both up and down—a bad hill.

The change was not for *their* benefit—but distinctly to their detriment (Court of Appeals of New York, R. 167, 165, Plaintiff's brief, p. 3), and for it they were obliged to pay a million of dollars.

The damage was done for the *benefit* of *the* PUBLIC—and *the* PUPLIC—*ought to pay for it.*

In the Court of Appeals of New York, Chief Judge Parker delivering its judgment in this case, said: (R. 170) —"Undoubtedly the State * * * "still has the "power to authorize ascertainment of the damages to the "abutting owners through its court of claims, and to pro- "vide for their payment, *and it may be well that it would "be equitable to do so.*" In 1901 the state made the law chapter 729 of the laws of that year which is printed in ~~the Appendix to~~ this brief ~~(Appendix I),~~ and by that law it gave (2 Laws 1901, 1787) jurisdiction to the court of claims to "hear, audit and determine the *alleged claims*" of persons owning "real property abutting on Park ave- "nue *for* DAMAGES *alleged to have been caused* TO SAID "PROPERTY by the acts and operations performed" by the board created by chapter 339 Laws 1892—"and to "render judgments therefor against the state and in "favor of said claimants."

This means diminution in value.

Chicago *v.* Taylor, 125 U. S., 161.

2. THE STRUCTURE HAS BEEN PAID FOR BY TAXATION, AND THE PLAINTIFF CAN BE PAID BY TAXATION—OF OTHERS, OR EVEN OF HIMSELF. THIS COULD NOT BE UNDER THE RULE OF THE ELEVATED CASES.

20 Jun. '92. In Bohm *v.* M. E. R. Co. (129 N. Y., 576), the Court of Appeals of New York, speaking by Judge Peckham, said (p. 586):

"Before entering on a discussion of these matters I "think it proper to say that I should hesitate to admit

"the correctness of the claim made by defendants that "*where private property is taken by a mere business* "*corporation, as for a public use under the granted* "*power of eminent domain, the legislature could provide* "*that such property could be paid for by benefits accru-* "*ing to the landowner's adjacent property consequent* "*upon the taking.* This is the case in regard to munici- "pal corporations where land is taken for a public street, "or other public and municipal purpose, and where the "benefits arising to the adjacent lands of the owner "whose property is taken may be set off against the "value of the land taken. So in the case of property "taken by the state for canal or other public purposes, "where the owner of the land was frequently paid its "value by the benefits received to the adjacent land "not taken. The principle underlying these cases is, "however, the right of the muicipality or state to tax "the owners of the land left, in order to pay for the land "taken, on the ground that they are specially benefited "by the taking, and hence should be specially taxed for "the payment of the land. The case of *Genet* v. *City of* "*Brooklyn* (99 N. Y., 296) is no authority for a contrary "view, for I think it supports that which I have sug- "gested. *A mere trading or business corporation has* "*no power of taxation*, AND THE STATE COULD NOT DELE- "GATE SUCH POWER TO IT. If *such* company desire "another's property *it must pay a just compensation* "*for it, and that compensation would not consist* IN ITS "DOING THE OWNER SOME BENEFIT UPON HIS REMAINING "PROPERTY."

The object of this point and the above quotations is simply to try to satisfy the Court that—

1. By the elevated railroad cases the *structure* was the thing paid for and not the running of the trains—and that distinction, we submit, is also made in the Court's opinion in the *Muhlker* case—

2. The the finding in this case is the same—only damage for *the structure*.

3. That the defendants are not liable *for the structure*, but the *State* is.

4. And New York having provided for the payment out of her own treasury for the damages caused by *the* structure in case the railroad companies were *not* liable for them, and the court of appeals of New York having held that the railroad companies ARE *not* liable, the judgment is right, and should be affirmed.

SEVENTH POINT.

The judgment is so obviously maintainable upon the independent ground adjudged by the State Court, not involving a federal question, that the writ of error should be dismissed or the judgment affirmed.

The plaintiff Kierns, as is alleged in his complaint, acquired his described premises in April, 1882. The railroad structure as it existed in Park Avenue at the time of his purchase and down to the time of the changes under the act of 1892, and which the trial court adjudged the defendants had acquired the right to main-

tain, is shown by the map or sectional view thereof appearing upon the opposite page.

It stands undisputed that the muniments of title under which the defendants acquired the right to the exclusive possession and use of this land by and for that railroad structure embraced, among others, the deed purporting to grant the fee of the center 24 feet, with the right of occupying the entire 100 feet, then width of the avenue, with embankments or excavations which the railroad company might deem its corporate use required.

The line of reasoning which would lead to the conclusion that a title evidenced by or growing out of such exclusive occupancy and use of the land would be inadequate to justify the occupancy and use of the same land with a higher railroad structure, would, by the same rule of logic, lead to the conclusion that one having entered under color of title in fee and possessed for the statutory period of limitation a tract of land with a one-story building thereon, could not, by the title thus acquired, and evidenced, justify a subsequent possession of the same tract of land with the maintenance of a two-story building thereon.

The right of maintenance and use of an elevated structure was specifically provided for in the grant. The common-sense interpretation of the right acquired under that grant is that stated by O'Brien, Judge, in the *Welde* case (168 N. Y., 597–599): "It is obvious that the railroad and not the grantor was to be the proper judge to determine where excavations and embankments were necessary and the proper width and slope of the same within the limits of the 100 feet."

If it may be urged that the maintenance of the railroad structure as now elevated is not by reason of railroad necessity, but by reason of necessity of enlargement of the street by occupancy and use for it of the land theretofore occupied exclusively by and for the railroad so

much the stronger becomes the reason for the act of 1901 and for the observation of the Court of Appeals that it might be equitable for the State to provide compensation from its treasury.

Moreover, it distinctly appears by what is said by Bartlett, *J.*, writing for the Court of Appeals in the Ketcham case (177 N. Y., 247, 251), that that court did not regard these complainants as at all disentitled to compensation for their easements actually taken by reason of anything contained in or wanting in the 1892 enactment, and that it did not regard mere absence of specific provision in that enactment for compensation as any limitation upon the general provisions of the law affording a remedy of and method of award of such compensation. That language is:

> "In Dolan *v.* N. Y. & Harlem R.R. Co. (175 N. Y., 367), Judge Haight, writing for the court, said (p. 371): 'If the station-houses occupy more of the street than the viaduct and tend to deprive the plaintiffs of their easements of light, air and access, we think the defendants should pay therefor.'
>
> This language is, in general terms, an indication of the rule of damages to be applied in these station-house cases which have survived the former decisions of this court. It is desirable that the rule should be clearly stated for the guidance of counsel in the trial of similar cases.
>
> If the plaintiff proves that the steel viaduct has been extended beyond the width of the structure between stations, and is clearly a part of the work necessary in erecting the station, and an injury is established by reason thereof, proper damages should be awarded."

The evidence before the trial court established defendants more than twenty years' continuous, open, hostile and exclusive possession of this railroad ground under color of all the muniments of title mentioned in para-

graph "Fourth" of the decision, and which included a deed in and by which Benson, the grantor, purported to

> "give, grant, bargain, sell and demise * * * all that certain piece of land * * * being part of one of the avenues laid out on the map of the City of New York as the Fourth Avenue, * * * and is bounded and described as follows, viz.:
>
> Northerly by the old road leading from Harlem to Harlem lane and McGown's pass; southerly by land of Mrs. Margaret McGown, and east and west by lines drawn parallel to the center line of the 4th avenue at the distance of twelve feet on each side thereof, * * * and on which they are to construct their railroad, and for no other purpose, with the power of sloping their embankments or excavations so much farther beyond the lines of said premises hereinbefore granted, as may be necessary to support their work, not, however, extending beyond the width of the avenue." (R. 40.)

That possession excluded plaintiff and his predecessors in title and all other persons and public street uses from the sixty-foot strip of land. As against plaintiff and his predecessors in title that possession was ascribable to this deed and constituted adequate notice of the claim of the property right which that deed purported to grant.

The rule is elementary that adverse possession for the period of statutory limitation under claim of the title which a deed purports to grant makes equally perfect title to the property right purported to be granted.

[See opposite page.]

The Conabeer Case.

The language of the grant of the above deed is identical with that interpreted, construed and adjudicated by the courts of the State in the *Conabeer* case in 84 Hun, 31, and affirmed 156 N. Y., 474.

The railroad structure, the existence and use of which was there complained of, is described in 84 Hun, page 36:

"in the center of said avenue crossing One Hundred

and Fourth Street and in front of the premises of the plaintiff, a viaduct about fifty-six feet wide and thirty-three feet high, retained by walls of masonry running parallel with the lines of the avenue."

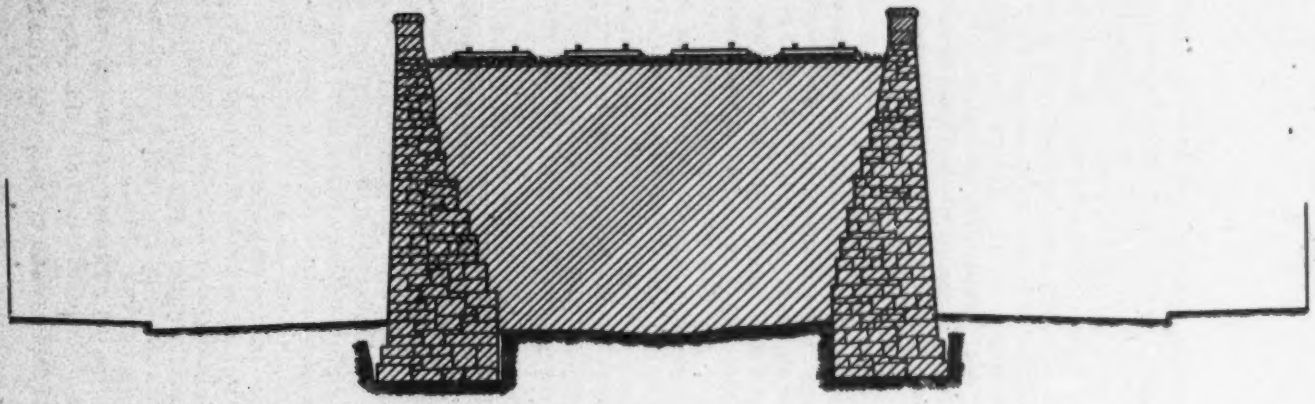
[See opposite page.]

Concerning this deed, Follett, *J.*, writing for the Supreme Court, General Term, at page 38 (84 Hun), said:

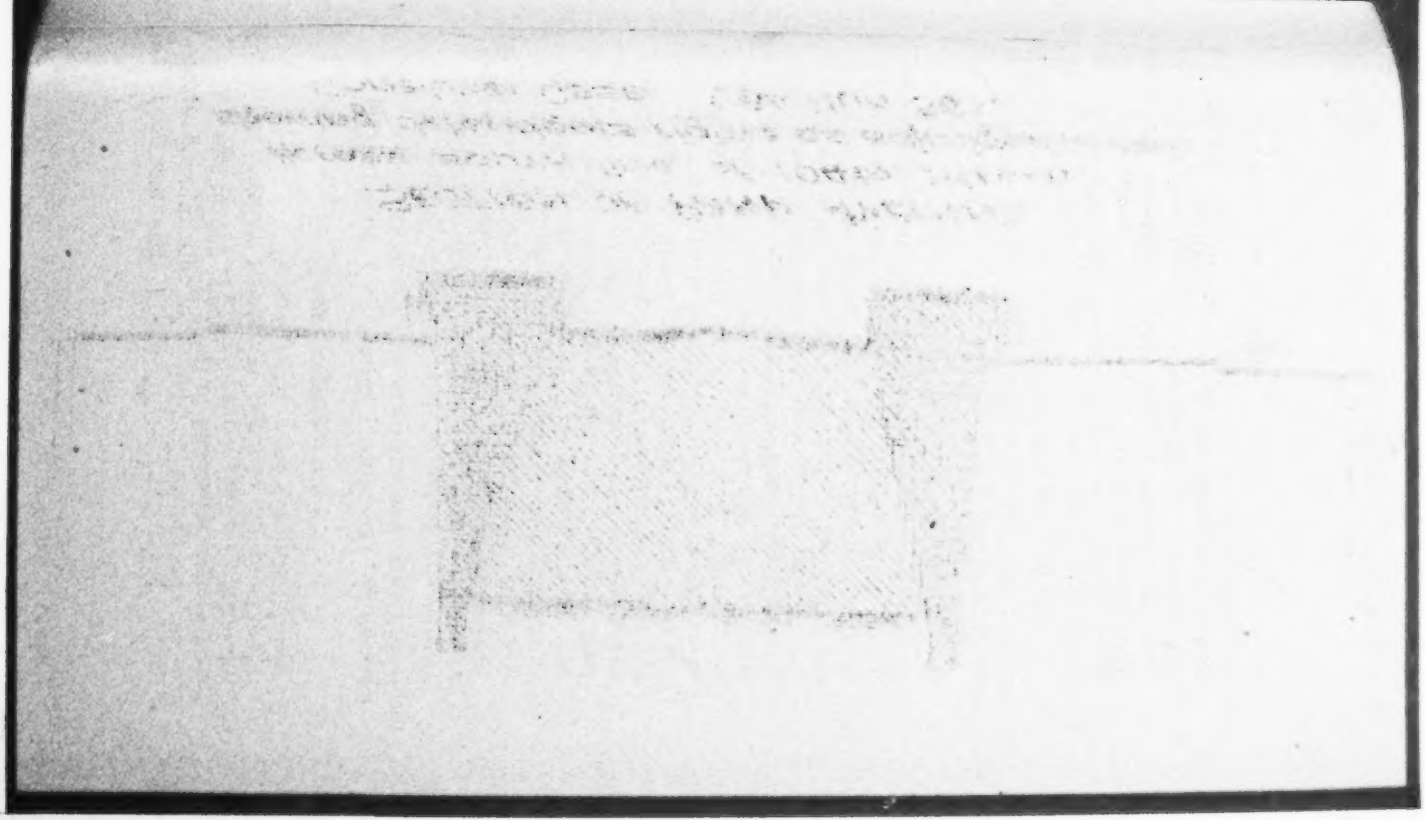
"By the terms of this deed the grantee was authorized to construct a railroad on the land conveyed, with the right of extending the embankment on which the rails were to be laid to the exterior lines of the avenue. At the date of this conveyance the avenue was 100 feet wide, and on each side of the land conveyed and within the avenue, there was a strip of land thirty-eight feet wide the title to which was not conveyed, but the right to cover these strips with an embankment was expressly granted. The embankment as now constructed is fifty-six feet wide, covering the land conveyed by Mrs. McGown, and a strip sixteen feet wide on each side of the strip granted by her, which is twenty-two feet less on each side of the strip conveyed than the defendants, by the grant, were authorized to use. By the conveyance, the grantee was authorized to construct a railroad on the subject of the grant, and, if necessary, to occupy the whole width of the avenue adjacent to the grantor's remaining land."

And upon the review of the case on appeal, Martin, *J.*, writing for the Court of Appeals, says (166 N. Y., 482):

"It is obvious that when the deed by Mrs. McGown to the New York and Harlem Railroad Company was given, it was understood between the parties that its railroad was to be built upon an embankment or viaduct in Fourth avenue, as it expressly provided not only that the grantee should have twenty-four feet of land in the center of the avenue during its corporate existence upon which to construct its railroad, but it also conferred upon the company the



SECTION OF PARK AVENUE,
Across South line of 104th. Street,
showing defendants rights as adjudged in the
Conabeer Case (84 Hun 36).



right to slope its embankment to the full width of the street. It is equally apparent that the grantor intended to confer upon the railroad company the right to construct, maintain and operate a steam railroad upon the premises so conveyed, and to thereby release it from any damages to her adjoining property arising from the proper exercise of that right. Thus the property now owned by the plaintiff which adjoins Fourth avenue became burdened with the easements or right of the company to maintain and operate its railroad at that place, so that neither the owner, nor her grantee, could recover damages for any injury to the property arising from the contemplated use, and could in no way interfere with the proper exercise of that right by the railroad company during its continuance."

(p. 484):

"It is claimed by the plaintiff that, as the New York and Harlem Railroad Company used only twenty-six feet of the avenue for the construction of its first viaduct, it waived any right it possessed in the remainder of the street, and, consequently, was entitled to maintain its viaduct upon that portion of the street only. Where a right is obtained by prescription, the measure of the right is controlled by the extent of the use. But where, as in this case, there is an express grant, the fact that the grant to its fullest extent is not immediately used will not amount to an abandonment or waiver of the rights thus expressly granted."

(p. 486):

"It is claimed that by this proceeding the city became vested with the title to the property of the railroad company, and, hence, that the deed from Mrs. McGown to the New York and Harlem Railroad Company was abrogated and its effect wholly annulled. This contention cannot be maintained. If it be admitted that the naked title to the land passed to the city, it is still clear that the consent of Mrs. McGown to the construction and operation of this road did not pass with it. That grant was at least an irrevocable consent to the use of the land for a specific purpose,

which continued and remained in the corporation to which it was made. But if, as claimed, it passed to the city, so that the city had the right formerly possessed by the railroad company, then it is equally clear that the right still exists, and as the city has consented to the use of the street, Mrs. McGown and her subsequent grantee are yet bound by that grant. When the street was opened in 1853, the railroad was upon a high viaduct along the centre of the avenue which was in the sole and exclusive possession of the railroad, and no portion of it was occupied as a public street. Therefore, whatever rights the city may have acquired, it is quite evident that, so far as Mrs. McGown was concerned, the right which she had granted to the railroad company never revested in her, and, consequently, neither she nor her grantees can assert the right thus released."

(p. 488):

"This case is clearly distinguishable from the elevated railroad cases upon which the plaintiff relies. In those cases there was no grant by the abutting owners of the right to use the street for the purposes for which it was used, and the appropriation of the street was held to be illegal, while here the use of the street was legalized by a grant from the plaintiff's grantor, as well as by the legislature and municipal authorities."

(p. 490):

"Under the circumstances of this case, it is manifest that the abutting owners who derived their title from Mrs. McGown subequent to her grant to the New York and Harlem Railroad Company were not entitled to have that portion of the avenue upon which the defendant's viaduct stands opened as a part of the public street, but that the only streets for public use which existed in Fourth Avenue, or to the use of which they were entitled, were streets forty-two feet in width upon each side of the viaduct occupied by the defendants."

(p. 491):

"The judgment" (in favor of defendants), "should be affirmed.

All concur except Parker, *Ch. J.*, not sitting."

It cannot be said of the above case or of the judgment therein that

> "The public interest, therefore, is made to much of. It is given an excessive, if not a false quantity."

The case did not involve any question of public interest, and did not present any question of public interest, and therefore the public interest was not either made too much of, or given an excessive or false quantity. And, moreover, it established that the maintenance of a solid embankment, protected by substantially perpendicular retaining walls, constituting a structure of equal width and greater height than the one here complained of, took no property from the plaintiff. The rights of the defendant railroad companies in the case at bar are of equal scope with those in the *Conabeer* case, when dealt with by application to them of the same rules of local property law.

The reason pointed out as above, upon which that case was said to be "clearly distinguishable from the elevated railroad cases upon which the plaintiff relies" was that "in those cases there was no grant" * * * while here "the use of the street was legalized by a grant from the plaintiff's grantor, as well as by the legislature and municipal authorities."

The judgments of the Court of Appeals in the *Fries* case, as also in the cases which have followed it, including the *Muhlker* case and the case at bar, included in the grounds upon which they were distinguished from the elevated railroad cases, the ground which alone and of itself was adjudged sufficient in the *Conabeer* case.

NOTE.—The Conabeer property was southerly of the 1892 improvement, and the structure complained of was built under the act of 1872. It follows that when the Court of Appeals held, as it did in this and the *Fries* and *Muhlker* cases, that the structure and use complained of were within the property right which the railroad company had ac-

quired, it was but applying the same rule of law which it had previously announced without reference to the 1892 enactment, and not any new rule or doctrine founded upon or formulated to sustain that enactment, or any authority exercised thereunder.

Revision and reversal of the holding of the State Court in this respect, then, is obviously not merely the reversal of the announcement of those courts based upon and in view of the 1892 enactment, but of the rule of local property law which antedated that enactment.

The Elevated Railroad Cases.

In the elevated railroad cases the defendants did not and could not set up any claim of having acquired from the abutting owner any property right in addition to that which had been reserved or acquired by the public for public street purposes. The railroad companies stood upon the consents granted to them by the public authorities, and upon these contended that the maintenance and operation of their railroads were consistent with and, indeed, a part of the public street use reserved or acquired by the public, and hence they were not liable.

The ground upon which *Story* and subsequent complainants were adjudged entitled to recover was that this contention of the railroad companies was untenable. The field of the inquiry which led to that determination did not at all involve the question whether complainants had parted with any property right or contract right other than and in addition to that reserved or acquired by the public for public street uses, because there was no foundation for any such claim, nor was it asserted. When Story purchased his premises he found the street upon which they abutted an open street, just such as was called for by the terms of the grant under which the street was created and abutters' rights vested. In reliance upon his

asserted right to have that condition continue, he alleged the threat and intent of the defendant railroad company to build its elevated road, and prayed injunction to restrain it from so doing.

Altogether different are the facts in the case at bar. When this plaintiff purchased the premises abutting upon Park Avenue described in the complaint, he found those premises abutting upon an open street or avenue of the width of 40 feet, and next to that a 60-foot strip of land occupied and used solely and exclusively for railroad maintenance and operation, and upon the opposite side of that strip of land another like open street or avenue, upon which the premises opposite to and 140 feet distant from his abutted. Upon his negotiation for the purchase of the premises described in the complaint, he was charged with notice and presumably had actual knowledge of the occupancy and use of that 60-foot strip of land. The rightfulness of that occupancy and use was open to inquiry, and, it is but fair to presume, was the subject of such inquiry as plaintiff saw fit to make concerning it.

In the language of Martin, *J.*, the *Conabeer* case (156 N. Y., 474), at page 493, "he purchased the premises with full knowledge of its existence, of its purpose and use, and with constructive notice of the defendant's grants. With that knowledge, presumably, she (he) made the purchase for a price which included all proper deductions from its value by reason of the presence of the defendant's railroad, and hence lost nothing by being deprived of any of her (his) otherwise appurtenant easements."

Inquiry upon that subject at that time would have and presumably did afford him the knowledge which the evidence in this case disclosed, that the public street had never been opened upon or over or occupied the same ground as the railroad; that the street had from its inception consisted of the public highway upon either side of

the railroad and not of the railroad ground. Whereas *Story* in his purchase had every reason to suppose that he was acquiring the same property right and the same measure of property right and contract right which the deed of the City under which the street was created, and under which the rights of his predecessor in title, the immediate grantee of the City, were vested; and that such was the character and measure of his property and contract right stood undisputed; in the case at bar this plaintiff at his purchase had open and notorious information that the rights of his grantor were not the equivalent of those which vested in the immediate grantee of Poillon, plaintiff's remote predecessor in title.

The question which this case presented was not at all that of the right of the State or the railroad company, or both, to maintain an elevated viaduct structure with a railroad thereon, founded merely upon the right to operate a surface railroad in the street, such as the *Kerr* case and *Fobes* case involved.

The earth surface in and upon which those railroads existed and were operated was a part of the open public street, the same identical parcels of ground used in common by both the railroad company and the public. The passing of railroad engines, cars and trains over the tracks differed in the degree but not in the character of their interference with the general public use of the same portions of the street's surface, from that of other vehicles passing over it; and the determination and adjudication that such railroad use is not inconsistent with street use is founded upon the fact that the one use does not exclude the other.

On the other hand, the case at bar does not at all involve the question of the right of existence and operation of an elevated railroad structure upon and over a theretofore existing open public street, for the operation of a railroad thereon which had theretofore used the street, or

the same portion thereof in common with the general public, but the question is as to the right of existence and use of such railroad structure over the strip of land thereunto rightfully, as against abutting owners, occupied and used by and for the railroad to the exclusion of every other occupancy and use.

Obviously the doctrine of law which sustains the right of existence and use of an elevated railroad structure over the same strip of land theretofore rightfully occupied and used exclusively for railroad purposes, constitutes no determination of the question whether a railroad such as the *Fobes* case dealt with, might be placed upon an elevated viaduct structure over the theretofore open street, without liability to abutting owners; nor does it at all involve the doctrine of the elevated railroad cases holding such structure inconsistent with the open street to which the complainants in these cases were adjudged entitled.

This 60-foot strip of land is now a part of the public street by virtue of the act of 1892. As against this plaintiff the trial court has adjudged that it was the right of the railroad company to occupy this land to the exclusion of street uses, as it had done prior to the act of 1892, and hence that, but for that enactment, it was not the right of the plaintiff to have an open street, or any street, over that strip of land.

The Lewis Case.

The contention on behalf of complainant in the *Fobes* case was that the rule of the elevated railroad cases was controlling as to the railroad and its use of which he complained.

So here the similarity of conditions presented by this structure and its use to that of the elevated railroads complained of in the Story and Lahr cases, at first blush, seemed to favor the theory that all contentions

and controversies in respect thereof were within and governed by the principle of the adjudged elevated railroad law. It was with seeming difficulty that the fact that the same ground was never before used for both street and railroad purposes, constituted a factor in the solution of the question of easement rights in and over the railroad ground which by the Act of 1892 became, *in fact*, a part of the street.

The court recognized some of the distinctions between the ordinary elevated railroad case and that regarding this structure in the Lewis case, but was, nevertheless, as we respectfully submit, led into quite obvious error by the influence of the natural leading of the consideration above mentioned. The right controverted in the elevated railroad cases was that of the construction and use of the elevated railroad in a theretofore free, open street. The character of occupancy and use of the street which the elevated railroad contemplated and effected was such as might with some measure of reason and propriety be termed a mere easement or incorporeal hereditament, the right of which as against abutting owners might be the subject of express or implied grant, and if the latter, might, with a measure of propriety at least, be characterized as a title by prescription; that is to say, it involved a unity of use of the street as an entirety by the railroad, its stations and approaches, and by its passengers as such, coincident with the use of the same street by the general traveling public in the ordinary public street uses. When, as the result of the act of 1892, the center strip of land was included in and made a part of the open traveled street or avenue, with the railroad bed above it, supported by columns resting upon masonry imbedded in the soil of the street, the conditions created were very like those existing in the elevated railroad avenues. In this very particular, however, the former railroad structure, the occupancy of the ground covered by it, and of the soil of

that ground exclusively for railroad purposes, and the structure maintained in such manner as to exclude the public from the railroad ground, differed in character entirely from the occupancy and use of the avenues by the ordinary elevated railroad, and from the occupancy and use of this avenue by the now existing Park Avenue viaduct structure.

Title by prescription is not recognized upon either principle or authority as the title upon which to rest a right of sole and exclusive possession of, and the maintenance of fixed physical structures upon, a tract or strip of land. The exclusive possession and use is not the exercise of a mere easement right, or the character of evidential fact tending to show that incorporeal right; while it includes the right of passage upon and over the strip of land, it includes also very much more than that, in that it is the physical possession of the land of the character designated in the law as "adverse possession."

When the plaintiff purchased his land abutting this avenue, then of the open width of 40 feet, upon which his premises abutted, and saw the adjoining 60 feet devoted to and used exclusively for railroad purposes, this was not merely notice of a right to operate a railroad upon the street surface, such as the *Fobes* case dealt with, but a right to possess the lands to the exclusion of every other occupancy and use. It was such notice as to put him upon inquiry concerning the right of the railroad company to do what it was there openly doing in that regard. It was a notice of adverse possession of the land, and not of a mere right to move engines, cars and trains over it. That inquiry pointed to the record of the deed to which the possession was to be imputed as explanatory of it; it led to evidence of a possession continued for upwards of 50 years, during which the ground occupied by the railroad had never been used by the public in common with the railroad. Such inquiry led to the record of

the deed explanatory of that exclusive possession, and which purported to grant and release, not merely the right to build, maintain and operate a railroad upon the surface of the avenue, or upon the surface of the ground, but specifically to occupy with its embankments or excavations the full width of 100 feet. It was a present and perpetual release of all damages resulting to premises abutting the avenue, not merely by a railroad upon the earth's or avenue's surface, but elevated or depressed, as it might be, by embankment or excavation of the width of 100 feet.

It is no answer to this to say that the deed when made did not carry good title because the grantor therein had at this particular point already parted with his title. The deed constituted the color of title under which the railroad company from 1835 to 1897 maintained its continuous, hostile, open and exclusive possession of so much of the property described in the deed as was requisite for its railroad structures as within that time maintained and used. The character of deed which that possession constituted notice of to plaintiff was not that of a property right which would justify maintenance of a railroad upon and over ground to be used by it and the general public, but of a deed vesting or purporting to vest the right to such exclusive possession as was there exercised.

One of the errors which intervened in the *Lewis* case, and which was corrected in the *Fries* case, was that of a proper recognition of the source and character of title, or color of title, upon which was maintained the exclusive possession by the railroad, which the trial court in each of the cases adjudged the defendants entitled to. The character of the title to which that rightful exclusive possession was ascribed in the *Lewis* case, to wit: that of title by prescription, did not embrace proper cognizance of the nature of title requisite to justify that which the court found to be justified. The court in the *Lewis* case con-

ceived, and went upon the hypothesis, that because the railroad company had the consent of the City to the building of its road in the laid-out but then unopened avenue, therefore it could not be permitted to claim title under its deed from Benson produced in evidence, but nevertheless might be permitted to claim title under a deed supposed to be lost; and, upon that hypothesis, it was held that, as between the railroad company and the City, the railroad possession was presumably under and in subordination to the title of the City; but that as against the abutting owner it was hostile and of character to evidence the acquirement of title; but the title presumed to have been acquired, instead of that which the deed put in evidence purported to grant, was that under a deed presumably lost, and presumably carrying only such property right as was requisite for the maintenance and use of the successive railroad structures which existed prior to the present one.

The charter of the Harlem Company obviously contemplated a railroad which should exclude the public from its ground, and, instead of proceeding upon the hypothesis of the *Kerr* and *Fobes* cases, that if the railroad were located within the bounds of a public street the public consent would constitute sufficient authority for their maintenance and use of the road, the charter, on the contrary, specifically and peremptorily compelled the railroad company to acquire the property not donated for its right of way, and for that purpose gave it the power of condemnation. The railroad company did not proceed upon the hypothesis that public consent constituted sufficient authority for the building and maintenance of its road where it was located. On the contrary, it proceeded to acquire, by condemnation in some instances, and by deeds in others, the title of and for its right of way, in obedience to the command of its charter. Having gotten these,

it proceeded to build its road, and had it in operation in or about 1835.

The character of its possession is only properly ascribable to such character of deed or muniment of title as would be adequate to authorize and warrant such character of possession. A deed purporting merely to grant the right of passage of engines, trains and cars over the surface of the ground until the street was opened, and upon the surface of the street after that, would not have been sufficient to authorize the maintenance and use of railroad structures which excluded the grantor and the public from the ground occupied by them. Any deed fairly within the contemplation of a title or grant by "prescription" would constitute no sufficient warrant for that character of possession. The railroad structure, and use of it, as plaintiff saw them prior to his purchase of the premises described in his complaint, was notice to him of the title which gave a right of possession to the exclusion of all other occupancy and uses, and which included every beneficial right and interest in the land. When this case went to the Court of Appeals, and that court found in the record the finding of the trial court as set forth in its decision, and searched the record for the nature and character of the evidence on which that finding was founded, that record showed it to be based, not upon title by prescription, or a deed supposedly lost, but upon the muniments of title proven, including the deed set forth in the evidence as constituting the color of title under which the exclusive possession had been maintained, and which the trial court had found to be rightful.

CASES UNDER ACT OF 1892.

The ground upon which the trial court held the plaintiff disentitled to recover in respect of the maintenance and use of the railroad structure existing at the time of the

1892 enactment was, not that there had not been a property right or contract obligation which, if still in force, the maintenance and use of that structure would be inconsistent with; butthat by the muniments of title set forth "the said defendant railroad companies acquire the right without liability to the plaintiff to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to August, 1894, as hereinbefore described;" in other words, that the property right or contract obligation upon which plaintiff relied had been released to and acquired by the railway companies.

This determination of the trial court was founded upon its interpretation, construction and legal view of all of the facts, circumstances, grants, express and implied, and other oral and documentary evidence before it.

The adjudication of the trial court was that the property rights which the railroad companies had acquired from the predecessors in title of plaintiff, and from plaintiff, were such as entitled them to the exclusive occupancy and use of that strip of land for railroad purposes without liability to the plaintiff.

The ground upon which the trial court concluded and determined that the existence and use of the elevated structure constituted a trespass upon plaintiff's property rights, was, not that plaintiff was entitled, as against the railroad companies, to have this strip of land opened for ordinary street uses, either relieved of the railroad or otherwise, for the court had expressly found to the contrary; but, upon the ground that the right which the railroad companies had acquired to occupy and use this 60-foot strip of land exclusively for railroad purposes was not such as could justify the maintenance and use of an elevated railroad structure upon and over the same strip of land, which the court had determined that the railroad companies had acquired the right to occupy and use for

railroad purposes to the exclusion of all other occupancy or use.

When by the appeal of defendants, first to the Supreme Court, Appellate Division, and second to the Court of Appeals, the jurisdiction of those courts was invoked to review and determine the accuracy of the judgment of the trial court in adjudging these property rights as aforesaid acquired by the railroad companies as insufficient to justify the maintenance and use of the existing railroad structure, those courts in turn were called upon to interpret, construe and adjudge the legal effect of, not at all the contract obligation under which easement rights had become vested in plaintiff, or her predecessor in title, but rather and solely the legal effect of the instruments, grants, express and implied, and other muniments of title which had been acquired from them by the railroad companies, and which the trial court had determined was sufficient to justify the maintenance and use of the 1872 railroad structure, but insufficient to justify the maintenance and use of the 1892 railroad structure.

The result of that review by the Court of Appeals was the determination that the property rights which the railroad companies had acquired from and against plaintiff and his predecessors in title, and which the trial court had found and adjudged sufficient to justify the maintenance and use of the 1872 railroad structure, were sufficient to justify the maintenance and use of the 1892 railroad structure.

In the consideration and discussion which led to the conclusion by and upon which these cases were distinguishable and distinguished from the ordinary railroad cases, the State courts had no occasion to examine with particularity the question of similarity or of difference between the original property rights or contract rights of the parties in the one class of cases as compared with those in the other, because the controverted question pre-

sented did not relate to original conditions, but to subsequent changes or modifications thereof. In the ordinary elevated railroad cases the abutting owners had parted with nothing of either property right or contract right except that which had been granted or taken for public street uses; while in these cases it was equally undisputed that the railroad companies had acquired from the abutting owners, and the abutting owners had parted with some property rights and contract rights other than and in addition to those granted or taken for public street uses, and the question before the court was as to the extent of the rights which the railroad companies had thus acquired, and these plaintiffs and their predecessors in title had parted with. Thus, in the *Fries* case (169 N. Y., 270), O'Brien, *J.*, writing for the Court of Appeals, having in the earlier portion of his opinion stated that the parties had discussed before the court the effect of a certain deed to the railroad by the former owner of plaintiff's property, and other details relating to the right of the railroad construction and maintenance in the street, and that in the view of the court this discussion was unimportant, because the decision of the trial court contained the express finding that the property rights and contract rights which the railroad companies had acquired were such as entitled them to maintain and use the railroad and railroad structures as they were maintained and used to and until February, 1897, without liability to the plaintiff, and that the character of maintenance and use as thus found to have been rightful was such as totally excluded the predecessors in title of plaintiff, and plaintiff, and the public, from all access to or over or use of the strip of land theretofore and now occupied by the railroad, proceeded to discuss the right of the State as against Fries, to do what it did, in view of the rights which the railroad companies had as aforesaid acquired from Fries and his predecessors in title, and announced the conclusion that

because of the rights so acquired, the act of 1892 and the authority exercised and acts done thereunder were rightful. The learned judge on pages 278–279 (160 N. Y.,) announces specifically the ground of distinction between the elevated railroad cases and the case before the court as follows:

> "The elevated railroad cases in this court proceed
> "upon the principle that, as against abutting owners,
> "the railroad was unlawfully in the street as they
> "had not consented to the construction or conveyed
> "the right to interfere with their easements. But
> "in the case at bar we have an express finding that
> "the defendant had acquired the right as against
> "the plaintiff to use the street for the operation of
> "the railroad. Hence, the principles upon which
> "that mass of litigation proceeded have no applica-
> "tion to this case, and so this court has held.
> "(*Conabeer v. N. Y. C. & H. R. R.R. Co.*, 156
> "N. Y., 474)."

Having in mind the fundamental rule and doctrine that the right of review and to reverse upon review is dependent upon the finding that the judgment is erroneous, in that it is not sustainable upon any ground that is not violative of the Federal Constitution, in some one or more particulars complained of, and that such right of review and reversal does not at all arise upon mere erroneous statement in the opinion announced, it is obviously more specious than sound to grasp at such supposedly erroneous statements in the opinion, and which, indeed, can be deemed erroneous only by reason of considering them as having no relation to facts set forth elsewhere in the same opinion, and, upon such disjointed excerpts of the opinion, assume the province of reviewing and reversing the judgment.

Each expression in the opinion is to be regarded as but a part of the entire whole. Each statement is to be taken together with and in the light of every other statement, which together constitute the entire opinion.

The judgment of the state courts determines solely the question of the liability of the railroad companies to the plaintiff. Plaintiff's complaint was against the railroad companies. It alleged that they had constructed or were constructing and intending to complete and maintain this structure, and when complete to operate the steam railroad upon it. The proof utterly failed to show that the defendants were the builders of the structure. The proof showed, on the contrary, that the structure was built by the State. That proof was undisputed. The finding is that the structure was built as provided by the act of 1892, to wit: by a state board created for that purpose. At the time of the trial the structure stood where it was built, and stands there to-day, not by reason of anything that the defendants have done, but by reason of the character and strength of the structure which the state built. The railroad companies have no more right to remove it than the plaintiff has. The determination of the trial court was that the railroad companies were not answerable in damages for the building of that structure. To have reached any other conclusion would have been to say that the railroad companies were answerable in damages for what the State did, which the railroad companies could not prevent, and with the continuance of which the railroad companies are powerless to interfere. What is true of the building of the structure is true regarding its existence as built so far as concerns the existence of this structure, and any damages resulting from it to the plaintiff; it is not a case of a structure created or existing by the act of the defendants, either with the permission of or in obedience to the command of the state, but by the act of the state itself, through the board created by it for that purpose. If this structure is of such unlawful character that it is the right of any one, other than the state itself, to remove it, it is as equally the right of this plaintiff as of the defendants.

Injunction against the defendants' use of the structure would not serve to remove the structure. A mandatory injunction against the defendants commanding them to remove the structure would certainly be unwarranted, for it would command the doing of a thing which they have no legal right to do; and, furthermore, as now appears, it does not at all follow that because the plaintiff is not entitled to hold the defendants answerable for a thing which they did not do, and with the consequences of which they are powerless to interfere, that therefore he is without remedy.

The Court of Appeals pointed out the proper source of plaintiff's remedy, and the state has, as above shown, by Chapter 729 of the Laws of 1901, provided that remedy against the state through its Court of Claims.

If upon any view it be the legal right of this plaintiff to have restored the conditions existing at the time of the 1892 enactment, whatever right he had in regard when this suit was instituted, he had as the foundation for objection to the work when the State by its board commenced the work of building an elevated structure opposite his premises.

During the five years that that work was in progress it was open and notorious. His right to speak then was clear. Upon reason and equity it would seem that his duty to speak then was equally clear, and that he failed to speak when he should, and thereby waived his right to be heard now. He saw that work go on to its result and consummation, which he knew from the first to be the designed result and consummation. By that work thus conducted and completed under his observation and notice the former railroad structure was destroyed and the present one supplied, not by the railroad company, but by the State. The inquiry naturally suggests itself, upon what foundation, as for what reason, should the railroad com-

panies be at the expense of undoing what the State did, and what, if plaintiff now has any right of complaint, he had the right to speak against and prevent the consummation of. Upon what principle of law or logic should plaintiff be permitted to remain thus silent and apparently acquiescent while this great work was carried on to its consummation, and now seek to saddle upon the the railroad companies the expense of restoring that which he might have prevented deprivation of by timely intervention on his part.

THE MUHLKER CASE IN THIS COURT.

We respectfully submit that in the Muhlker case the determination and judgment of the court have in an important and apparently controlling particular proceeded in the absence of regard to facts, which, if taken account of, well might and probably would have been deemed to render applicable to and decisive of the case rules and principles of law, other than and different from those which the facts accepted by the court have seemed to warrant application of, as the basis for adjudging reversal of the judgment of the state court, to wit:

The theory of fact upon which this court proceeded to adjudge the reversal of the judgment of the state court, is:

That the plaintiff's property right of light and air in and over the entire 140 feet width of Park Avenue was identical with the like property right of *Story* and *Lahr* in and over the streets upon which their property abutted, save and except only that plaintiff's such property right was subject unto such limitation and interference as resulted from the right of the railroad companies to maintain and operate their railroad upon the street surface, as in the *Kerr* and *Fobes* cases, or in and upon the railroad structure built and used under the act of 1872; whereas, the real fact was and is that by the deed of Poillon to the defendant Harlem Company, and the more than sixty

years' continuous, hostile, open and notorious possession under the claim, as against plaintiff and his predecessors in title, of the title which the said deed purported to grant, plaintiff's said property right of light and air in and over the said avenue was subject unto the right of the railroad companies to maintain and use their railroad at its present elevation, supported by a solid embankment with slopes occupying the width of one hundred feet. (Record, page 49.)

Upon and by reason of the foregoing misapprehension regarding the facts in the case, this court has supposed that the act of 1892, as construed and adjudged by the state court, operated to take from plaintiff his said property right of light and air vested in him subject only unto the limitations first above stated, and that the state court had adjudged this operation of the statute a lawful exercise of the power of the state, because the design and effect thereof was the enlargement and improvement of the avenue for public travel therein; whereas, the true foundation of the judgment of the state court, in holding valid the said enactment, was, that the railroad companies had acquired, from and against plaintiff and his predecessors in title, all beneficial right and interest in the sixty foot strip of land, so that plaintiff had no property right of light or air or otherwise in or over it, because he and his predecessors in title had specifically released the right to object to the existence and use of a railroad at the elevation it now exists; and, hence, that the damage or loss resulting from the change of railroad structure was not the result of any legal injury; and upon this view it was that the state court adjudged the 1892 enactment not violative of the Federal Constitution.

It is only by means of revision of the judgment of the State court upon the above-mentioned rules of local property law that a status is presented apparently violative of the Federal constitution.

Indeed the rules of law to which these directions pertain are in no whit less solely those of local property law, than those upon which this court adopted the rule of the State courts in preference to that which it had itself twenty years previously announced.

Suydam v. *Williamson*, 24 How., 427.

We respectfully submit that the writ of error should be dismissed for want of jurisdiction, or that the judgment should be affirmed.

IRA A. PLACE,
THOMAS EMERY,
Of Counsel.

Supreme Court of the United States.

No. 99.—October Term, 1904.

Henry Muhlker, Plaintiff in Error, *vs.* The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company.	In Error to the Supreme Court of the State of New York.

[April 10, 1905.]

Plaintiff sues to enjoin the use of a certain elevated railroad structure on Park avenue, in the city of New York, in front of his premises, unless upon payment of the fee value of certain easements of light, air and access and other rights appurtenant to his premises. He also prays damages for injury sustained from the year 1890 to time of trial.

From the evidence in the case the Supreme Court found that the plaintiff had been since 1888 the owner of a lot of land on the northwesterly corner of Park Avenue and One Hundred and Fifteenth Street, on which he, in 1891, erected a five-story brick building, and that there were appurtenant to said lot and building "certain easements of light, air and access in and over said Park Avenue, in front of said premises." The defendant, The New York

and Harlem Railroad Company, is and was during all the times mentioned herein the owner of a railroad and railroad structures in Park Avenue, in front of such premises, and the New York Central and Hudson River Railroad Company is the lessee of said railroad and structures under a lease dated April 1, 1873, for a term of four hundred and one years; that said railroad, prior to 1872, was operated on two tracks laid upon the surface of said avenue and along the center thereof, in front of said premises.

In pursuance of chapter 72 of the Laws of 1872 certain changes were made in the railroad in front of said premises, between the years 1872 and 1874, whereby the number of tracks was increased from two to four and were laid along the center of the avenue, and at the south line of said premises were at the surface, and at the north line of said premises were laid in a trench about five and a half feet below the surface. In front of said premises the railroad was bounded on both sides by masonry walls about three feet high above the surface, and cut off access across said avenue immediately in front of said premises.

The New York Central and Hudson River Railroad Company in 1872 operated its trains over the railroad in front of said premises, and continued to do so until February 16, 1897.

The other facts are expressed in the finding of the court as follows:

> "FOURTH.—That pursuant to chapter 339 of the Laws of 1892, there was constructed along Park avenue, in front of plaintiff's said premises, between April, 1893, and March, 1896, a new permanent elevated railroad structure of iron and steel; that said railroad in front of plaintiff's said premises is about 59 feet wide and consists of four tracks laid on a solid roadbed, having a mean elevation of about 31 feet above the surface of said avenue, which roadbed is girded along the sides and in the center by solid iron girders, each 7 feet and 4 inches high, and is

supported by iron columns, of which there are six directly in front of plaintiff's said premises; and that the work of constructing said permanent elevated railroad structure was done under the supervision of a board created by said act.

"FIFTH.—That the defendant The New York Central and Hudson River Railroad Company laid the tracks on said permanent elevated railroad structure about March, 1896, and from said date down to February 16th, 1897, operated thereon in front of said premises trains of cars drawn by steam engines for the carriage of freight and material used in the construction of said structure, for which service said defendant was paid; that said defendant on February 16, 1897, began to operate regularly and permanently upon said permanent elevated railroad structure in front of plaintiff's said premises its passenger trains, drawn by steam locomotives.

"SIXTH.—That the rental and fee values of the plaintiff's said premises were damaged by the work of constructing said permanent elevated railroad structure and by the existence of the same from April, 1893, to March, 1896; also by said structure and the operation thereon of trains, as aforesaid, from March, 1896, to February 16, 1899, but that neither of said defendants is liable for such damage.

"SEVENTH.—That said permanent structure and the operation by said defendant, The New York Central and Hudson River Railroad Company, of passenger trains thereon since February 16th, 1897, are and have been a continuous trespass upon the plaintiff's easements of light and air appurtenant to his said premises, hereinbefore described as having a frontage of 76 feet and 10 inches on said Park avenue and a depth of 26 feet on 115th street; that solely in consequence of said trespass, and aside from any other causes, the rental and usable value of said premises was depreciated from February 16, 1897, down to October 10, 1900, in the sum of fourteen hundred dollars ($1,400) below what said rental value would have been during said period, if there had been no change in defendants' said railroad

in Park avenue in front of said premises pursuant to chapter 339 of the Laws of 1892; and that the fee value of said premises has been, and was on October 10, 1900, depreciated thereby in the sum of three thousand dollars ($3,000) below what said fee value would have been on said date if there had been no change in defendant's railroad as aforesaid.

"EIGHTH.—That the said sums awarded as damages are over and above any and all benefits conferred upon said premises by the changes made, pursuant to chapter 339 of the Laws of 1892, which said benefits result in part from improved access to said premises afforded by said changes, and are offset against the damages to said premises caused by said changes.

"NINTH.—That the said sums awarded as damages are exclusive of the damages that would have been occasioned to plaintiff's premises by the maintenance and use of the defendant's railroad and structures had there been no change in the same pursuant to chapter 339 of the Laws of 1892, for which last-mentioned damages the defendants are not liable either jointly or severally.

"TENTH.—That this action was commenced by the plaintiff on January 7, 1897, that the plaintiff on April 28, 1892, began an action in this court against the defendant for an injunction and damage by reason of the defendant's railroad structure and the operation of trains thereon in front of the premises described herein, as said railroad existed and was operated on said date; and that said last-mentioned action was discontinued on February 27, 1900."

A decree was entered enjoining the use of the railroad structure and its removal from in front of plaintiff's premises, but it was provided that the injunction should not become operative if the defendants' tender for the purpose of execution by the plaintiff "a form of conveyance and release" to them of the easements of light, air and access appurtenant to said premises, and tender further of the sum of $3,000, with interest thereon from October 10, 1900. Damages were also adjudged to plain-

tiff in the sum of $1,400, with interest from February 16, 1897, and cost. Either party was given the right to move at the foot of the decree for further directions as to the enforcement of the same.

In the form of the decision and judgment entered, and as to the legal principles involved, the court professed to follow *Lewis* vs. *New York & Hudson River Railroad* (162 N. Y., 202.)

The judgment was affirmed by the Appellate Division. It was reversed by the Court of Appeals, 173 N. Y. 549; and the judgment of that court, upon the remission of the case, was made the judgment of the Supreme Court and the complaint dismissed without costs. The case was then brought here.

Mr. Justice McKenna, after stating the case, announced the judgment of the Court and delivered the following opinion:

As we have observed, the Supreme Court followed *Lewis* v. *New York & Hudson River Railroad* (162 N. Y. 202), both in the "form of decision and judgment" and "the legal principles involved." Discussion was not considered necessary. The Appellate Division affirmed the judgment on the authority of the same case and other cases which had been ruled by it. The court, by brief expression, pointed out the identity of the cases and disposed of the defence made by the railroad companies of adverse possession as follows:

> "The question of defendants having acquired title by adverse possession was considered by this court in both the Fries and Sanders cases. In the former it was said: 'For these reasons the deed to the city was valid as against the railroad company, and it had no title to that part of the street in front of the plaintiff's premises, and its only rights, therefore, were

those which it had acquired by adverse possession. Within the rule laid down in the case of *Lewis* vs. *New York & Harlem R. R. Co.* (cited above), that adverse possession did not give to the railroad company the right to carry its tracks, which for twenty years had run in a cut, upon a viaduct such as this is above ground, in front of the plaintiff's premises. The case of Lewis applies fully to the one at bar.' In the Sanders case this court followed the decision just quoted, the presiding justice dissenting on the sole ground that 'Title by adverse possession as to the twenty-four feet strip, at least, was established by the evidence,"

In the case at bar there is a complete change of ruling by the Court of Appeals. The Lewis case is declared, in so far as it expressed rights of abutting property owners, to have have been improvidently decided, and the Elevated Railroad cases, which were made its support, were distinguished. The court rested its ruling on one point, the effect of the act of 1892, under which the structure complained of was erected, the court declaring that act a command to the railroad company in the interest of the public; indeed, made the State the builder of the new structure and the use of it by the railroads mere obedience to law. But it does not follow that private property can be taken either by the erection of the structure or its use. This was plainly seen and expressed in the Lewis case as to the use of the structure. It was there said: "When they (the railroads) commence to use the steel viaduct, they started a new trespass upon the rights of abutting owners." There was no hesitation then in marking the line between the power of the State and the duty of the railroad, and assigning responsibility to the latter. This was in accordance with principle. The command of the State, the duty of the railroad to obey, may encounter the inviolability of private property. And in perform-

ing the duties devolved upon it a railroad may be required to exercise the right of eminent domain (*Jacobson* v. *Wisconsin, Minn. & Pac. R. R.*, 179 U. S. 287); see also *Mayor and Aldermen of Worcester* v. *Norwich and Worcester R. R.* (109 Mass. 103). We do not, therefore, solve the questions in this case by reference to the power of the State and the duty of the railroads; the rights of abutting property owners must be considered, and against their infringement plaintiff urges the contract clause of the Constitution of the United States and the Fourteenth Amendment. The latter is invoked because the act of 1892 does not provide for compensation to property owners, and the former on account of the conditions upon which the strip of land constituting the avenue was conveyed to the city. There were two deeds to the city, one made in 1825 and the other in 1827. That of 1825 was stated to be "in trust, nevertheless, that the same be appropriated and be kept open as parts of public streets and avenues forever, in like manner as the other public streets and avenues in said city are and of right ought to be." The deed of 1827 was also "in trust that the same be left open as public streets for the use and benefit of the inhabitants of said city forever." Plaintiff derives title from Poillon, grantor of the city in the deed of 1827, and hence contends that he is entitled to enforce the trust created by Poillon's deed to the city. The railroads oppose this contention. They assert title to the land upon which the structure complained of stands by deed and by prescription. The details of these contentions we need not repeat nor discuss. They are stated at length in the Lewis case, and the conclusions there expressed are not disturbed by the decision of the Court of Appeals in the case at bar. The case is therefore presented to us as to the effect of the deed of Poillon to the plaintiff and to the city as constituting a contract, and the effect of the act of 1892 as an impairment of that contract or as taking plaintiff's prop-

erty without due process of law. These questions were directly passed on and negatived by the Court of Appeals.

It will be observed from the statement of facts that before the construction of the viaduct complained of the railroad ran partly on the surface of the street and partly in a cut or trench, the latter being flanked by *masonry* walls three feet high. The viaduct is a solid roadbed thirty-one feet above the surface, having iron girders on the sides and in the middle, and supported by iron columns, of which there are six in front of the plaintiff's land. The old construction prevented crossing or access to the tracks. The new construction impairs or destroys the plaintiff's easements of light and air. And such easements the trial Court found belonged to plaintiff in common with other abutters upon the public streets of New York and his damages for their impairment to be, as expressed by Bartlett, *J.*, in his dissenting opinion, "$3,000 fee damages, $1,400 rental damages, from February 16, 1897, to October 10, 1900," the date of trial, that is, $4,400 present damage. It is suggested, however, that the Court of Appeals did not deny the rights of the abutters, but considered that the most important phase of those rights was that of access, and the plaintiff did not have this over the railroad by reason of the stone wall. The basis of the suggestion, as we understand, is the idea that plaintiff was compensated for the injury of his easements of light and air by an increase of his easement of access without regard to the resulting damage. To do this, however, is to make one easement depend upon another, both of which are inseparable attributes of property and equally necessary to its enjoyment. It is impossible for us to conceive of a city without streets, or any benefit in streets, if the property abutting on them has not attached to it as an essential and inviolable part, easements of light and air as well as of access. There is something of mockery

to give one access to property which may be unfit to live on when one gets there. To what situation is the plaintiff brought? Because he can cross the railroad at more places on the street, the State, it is contended, can authorize dirt, cinders and smoke from 200 trains a day to be poured into the upper windows of his house.

In Barnett v. *Johnson* (15 N. J. Eq. 481), there is a clear expression of the right of abutting owners to light and air, and of the common practice and sense of the world upon which it is founded. "It is a right," the court said, "founded in such an urgent necessity that all laws and legal proceedings take it for granted. A right so strong that it protects itself, so urgent that, upon any attempt to annul or infringe it, it would set at defiance all legislative enactments and all judicial decisions." And, graphically describing the right, observed further, "Is not every window and every door in every house in every city, town and village the assertion and maintenance of this right?" It has been said *Barnett* v. *Johnson* anticipated "the principle upon which compensation was at last secured in the Elevated Railroad cases in New York." (1 Lewis Eminent Domain, 183.)

It is manifest that easements of light and air cannot be made dependent upon the easement of access, and whether they can be taken away in the interest of the public under the conditions upon which the city obtained title to the streets is now to be considered. The answer depends upon the cases of *Story* vs. *New York Elevated R.R. Co.* (90 N. Y., 122) and *Lahr* vs. *Metropolitan Elevated R.R. Co.* (104 N. Y., 268), known as the Elevated Railroad cases. The Lahr case was decided in 1887. The plaintiff in the case at bar acquired title to his property in 1888.

The first of the Elevated Railroad cases was the Story case, decided in 1882. The plaintiff in the case was the owner of a lot on the corner of Moore and Front Streets in the City of New York, on which there were buildings.

To their enjoyment light, air and access were indispensable, and were had through Front Street. The defendant was about to construct a railroad above the surface of that street upon a series of columns, about fifteen inches square, fourteen feet and six inches high, placed five inches inside of the sidewalk, with girders from thirty-three to thirty-nine inches deep, for the support of cross ties for three sets of rails for a steam railroad. The cars were to be of such a construction as to reach within nine feet of plaintiff's buildings, and trains were to be run every three minutes, and at a rate of speed as high as eighteen miles an hour.

The fact of injury to the abutting lot was found by the trial court, and also that the city of New York was the owner in fee of Front Street, opposite plaintiff's lots, and that he was not and never had been seized of the same in fee nor had any estate therein.

The Supreme Court said the case involved the question whether the scheme of the defendant amounted to the taking of any property of the plaintiff; if it did, it was said, the judgment was invalid, on the ground that the intended act, when performed, would violate not only the provision of the Constitution, which declared that such property should not be taken without just compensation, but certain statutes by which defendant was bound or owed its existence, and which would not have been upheld unless, in the opinion of the court, they had provided means to secure such compensation.

The plaintiff contended that, as owner of the abutting premises, he had the fee to one-half of the bed of the street opposite thereto, and he also contended, if the fee was in the city, he, as abutting owner, had such right to have light and access afforded by the street above the roadbed as entitled him to have it kept open for those uses until by legal process and upon just compensation

that right was taken away. The defendant justified its intended acts through the permission of the city. The issue thus made the court passed on, and in doing so assumed that the city owned the fee of the street and that the plaintiff derived his title from the city. It was held that the plaintiff had acquired "the right and privilege of having the street forever kept open as such;" and that the right thus secured was an incorporeal hereditament, which "became at once appurtenant to the lot and formed an 'integral part of the estate' in it," and which followed the estate and constituted a perpetual encumbrance upon the land burdened with it. "From the moment it attached," the court observed, "the lot became the dominant and the open way or street the servient tenement." Cases were cited for these propositions. And the extent of the easement was defined to be not only access to the lot, but light and air from it. The court said: "The street occupies the surface, and to its uses the rights of the adjacent lots are subordinate, but *above the surface* there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner." And further: "The elements of light and air are both to be derived from the space *over* the land on the *surface* of which the street is constructed and which is made servient for that purpose." This was emphasized, the court observing: "Before any interest passed to the city the owner of the land had from it the benefit of air and light. *The public purpose of a street requires of the soil the surface only.*" The easement was declared to be property and within the protection of the constitutional provision for compensation for its diminution by the contemplated structure.

It is, of course, impossible to reproduce the argument of the court by which its conclusions were sustained. It is enough to say that a distinction was clearly made between the rights of abutting owners in the *surface* of the

street and their rights in the *space above* the street, and the distinction was also clearly made between damages and a taking. A review was made of the cases upon which those distinctions rested. The power of a city to alter a grade of a street was adverted to, and held not to justify the intended structure. There was no change in the street surface intended, it was said, "but the elevation of a structure useless for street purposes and as foreign thereto," as the house which was held to be an obstruction in *Corning* vs. *Lowerre* (6 Johns. Ch., 439), or the freight depot in *Barney* vs. *Keokuk* (94 U. S., 324).

The conclusion of the Court and the distinctions made by it were repeated in *Lahr* vs. *Metropolitan Elevated R.R. Co.* (104 N. Y., 271). The structure complained of in the latter case was also an elevated railroad.

Chief Judge Ruger, speaking for the court, opened his opinion by observing that the action was "the sequel of the Story case," and that its defense seemed to have been conducted upon the theory of endeavoring to secure a re-examination of that case. The endeavor, it was said, must fail, because the doctrine of the Story case had been pronounced after most careful and thorough consideration and after two arguments at the bar, made by most eminent counsel, had apparently exhausted the resources of learning and reasoning in the discussion of the question presented. And it was declared that "it would be the occasion of great public injury if a determination thus made could be inconsiderately unsettled and suffered again to become the subject of doubt and theme of renewed discussion." The doctrine of the Story case was declared to be *stare decisis*, not only upon all the questions involved, but upon all that came logically within the principles decided. There was an enumeration of those principles, as follows:

(1) That an elevated railroad, of the kind described, was a perversion of the use of a street, which neither the

city nor the legislature could legalize without providing compensation for the injury inflicted upon the property of abutting owners.

(2) That abutters upon a public street, claiming title by grant from the municipal authorities, which contained a covenant that streets which could be laid out should continue as other streets, acquired an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street for the benefit of the property situated thereon.

(3) That such easement was an interest in real estate and constituted property, within the meaning of the Constitution of the State, and could not be taken for a public use without payment of compensation.

(4) That an elevated railroad, upon which cars propelled by steam engines which generated gas, steam and smoke and distributed in the air cinders, dust, ashes, and other noxious and deleterious substances, and interrupted the free passage of light and air to and from adjoining premises, constituted a taking of the easement, and rendered the railroad company liable for the damages occasioned by such taking.

The application of these principles was resisted on the ground that the city was the grantor of the plaintiff in the Story case and could not derogate from the title a property it conveyed, and it was contended that the case went off on that ground. This was rejected and the principles enumerated held to apply, notwithstanding the land in the street had been taken from plaintiff's grantor by proceedings *in invitum*. And rights of abutting owners were held to rest in contract constituted by the conditions upon which the city received the property.

Equally untenable are the grounds of distinction urged

in the case at bar against the application of those principles. What are they? In the Story and Lahr cases the railroads were imposed for the first time on the street. In the case at bar the Harlem railroad had occupied the surface of the street, and was changed to the viaduct. But in the Story and Lahr cases it was not the fact that the railroads were imposed on the street for the first time that determined the judgment rendered. It was the fact that trains were run upon an elevated structure, interrupting the easements of light and air of the abutting owners. It was this that constituted a use inconsistent with the purpose of the street. It was the "elevation of a structure," to quote again from the Story case, "useless for general street purposes." This situation of the railroad was especially dwelt upon in the Story case, and that case was distinguished thereby from the Surface Railway cases. And in the Lewis case a difference was recognized between the two situations and a balance struck between damage done by the railroad in one situation and the railroad in the other situation. The Lewis case, we have seen, was overruled by the Court of Appeals in the case at bar, while the Story and Lahr cases were said not to be in point. We think that the Lewis case was an irresistible consequence of the others, and the Story and Lahr cases are in point and decisive.

Another distinction is claimed, as we have already observed, between the case at bar and those cases. The act of the railroad in occupying the viaduct, it is said, was the act of the State. But this defence was made in the other cases. It did not give the court much trouble. It is urged, however, now, with an increased assurance. Indeed, it is made the ground of decision, as we have seen by the Court of Appeals. The court said: "The decisions in the Elevated Railroad cases are not in point. There no attempt was made by the State to improve the street for the benefit of the public. Instead, it granted to a corpo-

ration the right to make an additional use of the street, in the doing of which it took certain easements belonging to abutting owners, which it was compelled to compensate them for." And, further, making distinction between those cases and that at bar, said: "The State could not if it would — and probably would not if it could —deprive defendant of its rights to operate its trains in the street. But it had the power in the public interest to compel it to run its trains upon a viaduct instead of in the subway." And the court concluded that it was the State, not the railroads, who did the injury to plaintiff's property. The answer need not be hesitating. The permission, or command of the State, can give no power to invade private rights, even for a public purpose without payment of compensation; and payment of such compensation, when necessary to the performance of the duties of a railroad company, may be, as we have already observed, part of its submission to the command of the State. The railroads paid one-half of the expense of the change, "by the command of the statute, and hence under compulsion of law," to quote from the Court of Appeals. The public interest therefore, is made too much of. It is given an excessive, if not a false quantity. Its use as a justification is open to the objection made at the argument; it enables the State to do by two acts that which would be illegal if done by one. In other words, as under the law of New York the State can authorize a railroad to occupy the surface of a street it can subsequently permit or order the railroad to raise its tracks above the street and justify the impairment of property rights by the public interest. It was said in the Story case that "the public purpose of a street requires of the soil the surface only." And this was followed in *Fobes* v. *R. W. & O. R. Co.* (121 N. Y. 505), where a steam railroad was permitted upon a street without liability for consequen-

tial damages to adjoining property. The new principle based upon the public interest destroys all distinction between the surface of the soil of a street and the space above the surface, and, seemingly, leaves remaining no vital remnant of the doctrine of the Elevated Railroad cases. However, we need not go farther than the present case demands. When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.

And this is the ground of our decision. We are not called upon to discuss the power or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of State decisions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the Elevated Railroad cases and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different or that the plaintiff might have balanced the chances of the commercial advantage between the right to have the street remain open and the expectation that it would remain so is too intangible to estimate. We certainly can estimate the difference between a building with full access of light and air and one with those elements impaired or polluted. But we have already expressed this. We need only add that the right of passage is not all there is to a street, and to call it the primary right is more or less delusive. It is the more

conspicuous right, has the importance and assertion of community interest and ownership, properly has a certain dominance, but it is not more necessary to the making of a city than the rights to light and air, held, though the latter are, in individual ownership and asserted only as rights of private property. The true relation and subordination of these rights, public and private, is expressed, not only by the Elevated Railroad cases, but by other cases. They are collected in 1 Lewis Eminent Domain, section 91*c*, and it is there said, "established beyond question the existence of these rights, or easements of light, air and access, as appurtenant to abutting lots, and that they are as much property as the lots themselves."

Judgment is reversed and cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice BROWN concurs in the result.

True copy.

Test:

[SEAL.] JAMES H. MCKENNEY,
Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 99.—October Term, 1904.

Henry Muhlker, Plaintiff in Error, *vs.* The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company.	In error to the Supreme Court of the State of New York.

[April 10, 1905.]

Mr. Justice Holmes dissenting.

I regret that I am unable to agree with the judgment of the Court, and as it seems to me to involve important principles I think it advisable to express my disagreement and to give my reasons for it.

The plaintiff owns no soil within the limits of the avenue. The New York and Harlem Railroad Company at the time of the change was and long had been the owner, and the other defendant was the lessee of a railroad with four tracks along the middle of Park avenue, in front of the plaintiff's land, at the south end being at the surface of the avenue, and at the north in a trench about four feet and a half deep, the railroad being bounded on both sides by a masonry wall three feet high, which prevented crossing or access to the tracks. This is the finding

of the Court of first instance, and I take it to be binding upon us. We have nothing to do with the evidence. I take it to mean the same thing as the finding in *Fries* v. *New York & Harlem R.R.*, 169 N. Y. 270, that the defendants had "acquired the right without liability to the plaintiff to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16, 1897." The material portion of the decision of the Court of Appeals is that on this state of facts, as was held in the similar case of *Fries* v. *New York & Harlem R.R.*, the plaintiff had no property right which was infringed in such a way as to be anything more than *damnum absque injuria*. The finding that the railroad had the right to maintain the former structures was held to distinguish the case from the Elevated Railroad cases, where pillars were planted in the street without right as against the plaintiff. *Story* v. *New York Elevated R.R.*, 90 N.Y. 122, 160, 170, 178. *Lahr* v. *Metropolitan Elevated Ry.*, 104 N.Y. 268. The other so-called finding, that the new structure infringes the plaintiff's right, is merely a ruling of law that notwithstanding the facts specifically found the plaintiff has a cause of action by reason of his being an abutter upon a public street.

The plaintiff's rights, whether expressed in terms of property or of contract, are all a construction of the Courts, deduced by way of consequence from dedication to and trusts for the purposes of a public street. They never were granted to him or his predecessors in express words, or, probably, by any conscious implication. If at the outset the New York Courts had decided that apart from statute or express grant the abutters on a street had only the rights of the public and no private easement of any kind, it would have been in no way amazing. It would have been very possible to distinguish between the practical commercial advantage of the expecta-

tion that a street would remain open and a right *in rem* that it should remain so. See *Stanwood* v. *Malden*, 157 Mass. 17. Again, more narrowly, if the New York Courts had held that an easement of light and air could be created only by express words, and that the laying out or dedication of a street, or the grant of a house bounding upon one, gave no such easement to abutters, they would not have been alone in the world of the common law. *Keats* v. *Hugo*, 115 Mass. 204, 216. The doctrine that abutters upon a highway have an easement of light and air is stated as a novelty in point of authority in *Barrett* v. *Johnson*, 15 N. J. Eq. 481, 489, and that case was decided in a State where it was held that a like right might be acquired by prescription. *Robeson* v. *Pittenger*, 1 Green Ch. 57.

If the decisions, which I say conceivably might have been made, had been made as to the common law, they would have infringed no rights under the Constitution of the United States. So much, I presume, would be admitted by every one. But if that be admitted, I ask myself what has happened to cut down the power of the same Courts as against that same Constitution at the present day. So far as I know the only thing which has happened is that they have decided the Elevated Railroad cases, to which I have referred. It is on that ground alone that we are asked to review the decision of the Court of Appeals upon what otherwise would be purely a matter of local law. In other words, we are asked to extend to the present case the principle of *Gelpcke* v. *Dubuque*, 1 Wall. 175, and *Louisiana* v. *Pilsbury*, 105 U. S. 278, as to public bonds bought on the faith of a decision that they were constitutionally issued. That seems to me a great, unwarranted and undesirable extension of a doctrine which it took this Court a good while to explain. The doctrine now is explained, however, not to mean that a change in the decision impairs the obligation of contracts,

Burgess v. *Seligman*, 107 U. S. 20, 34; *Stanly County* v. *Coler*, 190 U. S. 437, 444, 445, and certainly never has been supposed to mean that all property owners in a State have a vested right that no general proposition of law shall be reversed, changed or modified by the Courts if the consequence to them will be more or less pecuniary loss. I know of no constitutional principle to prevent the complete reversal of the Elevated Railroad cases to-morrow, if it should seem proper to the Court of Appeals. See *Central Land Co.* v. *Laidley*, 159 U. S. 103.

But I conceive that the plaintiff in error must go much further than to say that my last proposition is wrong. I think he must say that he has a constitutional right not only that the State Courts shall not reverse their earlier decisions upon a matter of property rights, but that they shall not distinguish them unless the distinction is so fortunate as to strike a majority of this court as sound. For the Court of Appeals has not purported to overrule the Elevated Railroad cases. It simply has decided that the import and the intent of those cases does not extend to the case at bar. In those cases the defendants had impaired the plaintiff's access to the street. It is entirely possible and consistent with all that they decided to say now that access is the foundation of the whole matter; that the right to light and air is a parasitic right incident to the right to have the street kept open for purposes of travel, and that when, as here, the latter right does not exist the basis of the claim to light and air is gone.

But, again, if the plaintiff had an easement over the whole street he got it as a tacit incident of an appropriation of the street to the uses of the public. The legislature and the Court of Appeals of New York have said that the statute assailed was passed for the benefit of the public using the street, and I accept their view. The most obvious aspect of the change is that the whole street now

is open to travel, and that an impassable barrier along its width has been removed; in other words that the convenience of travellers on the highway has been considered and enhanced. Now still considering distinctions which might be taken between this and the earlier cases, it was possible for the New York Courts to hold, as they seem to have held, that the easement which they had declared to exist is subject to the fullest exercise of the primary right out of which it sprang, and that any change in the street for the benefit of public travel is a matter of public right, as against what I have called the parasitic right which the plaintiff claims. *Scranton* v. *Wheeler*, 179 U. S. 141. *Gibson* v. *United States*, 166 U. S. 269.

The foregoing distinctions seem to me not wanting in good sense. Certainly I should have been inclined to adopt one or both of them, or in some way to avoid the earlier decisions. But I am not discussing the question whether they are sound. If my disagreement was confined to that I should be silent. I am considering what there is in the Constitution of the United States forbidding the Court of Appeals to hold them sound. I think there is nothing; and there being nothing, and the New York decision obviously not having been given its form for the purpose of evading this Court, I think we should respect and affirm it, if we do not dismiss the case.

What the plaintiff claims is really property, a right *in rem*. It is called contract merely to bring it within the contract clause of the Constitution. It seems to me a considerable extension of the power to determine for ourselves what the contract is, which we have assumed when it is alleged that the obligation of a contract has been impaired, to say that we will make the same independent determination when it is alleged that property is taken without due compensation. But it seems to me that it does not help the argument. The rule adopted as to contract is simply a rule to prevent an evasion of the constitutional

limit to the power of the States, and, it seems to me, should not be extended to a case like this. Bearing in mind that, as I have said, the plaintiff's rights, however expressed, are wholly a construction of the Courts, I cannot believe that whenever the Fourteenth Amendment or Article 1, Section 10, is set up we are free to go behind the local decisions on a matter of land law, and, on the ground that we decide what the contract is, declare rights to exist which we should think ought to be implied from a dedication or location if we were the local Courts. I cannot believe that we are at liberty to create rights over the streets of Massachusetts, for instance, that never have been recognized there. If we properly may do that, then I am wrong in my assumption that if the New York Courts originally had declared that the laying out of a public way conferred no private rights we should have had nothing to say. But if I am right, if we are bound by local decisions as to local rights in real estate, then we equally are bound by the distinctions and the limitations of those rights declared by the local Courts. If an exception were established in the case of a decision which obviously was intended to evade constitutional limits, I suppose I may assume that such an evasion would not be imputed to a judgment which four Justices of this Court think right.

As I necessarily have dealt with the merits of the case for the purpose of presenting my point, I will add one other consideration. Suppose that the plaintiff has an easement and that it has been impaired, bearing in mind that his damage is in respect of light and air, not access, and is inflicted for the benefit of public travel, I should hesitate to say that in inflicting it the legislature went beyond the constitutional exercise of the police power. To a certain and to an appreciable extent the legislature may alter the law of nuisance, although property is affected. To a certain and to an appreciable extent the use of particular property may be limited without compensation.

Not every such limitation, restriction or diminution of value amounts to a taking in a constitutional sense. I have a good deal of doubt whether it has been made to appear that any right of the plaintiff has been taken or destroyed for which compensation is necessary under the Constitution of the United States. *Scranton* v. *Wheeler*, 179 U. S. 141. *Meyer* v. *Richmond*, 172 U. S. 82. See *Mugler* v. *Kansas*, 123 U. S. 623, 668. *Merchant* v. *Pennsylvania R. R.*, 153 U. S., 380. *Canfield* v. *United States*, 167 U. S. 518, 523. *People* v. *D'Oench*, 111 N. Y. 359, 361. *Sawyer* v. *Davis*, 136 Mass. 239. *Commonwealth* v. *Alger*, 7 Cush. 53. Compare *United States* v. *Lynah*, 188 U. S. 445, 470.

I am authorized to say that the CHIEF JUSTICE, Mr. Justice WHITE and Mr. Justice PECKHAM concur in the foregoing dissent.

True copy.

Test:

Clerk Supreme Court, U. S.

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CHAP. 268.

AN ACT to incorporate the New-York and Harlaem Rail-Road Company.

Passed April 25, 1831.

The People of the State of New-York, represented in Senate and Assembly, do enact as follows:

SEC. 1. Benjamin Bailey, Mordecai M. Noah, Benson McGown, James B. Murray, Charles Henry Hall, Moses Henriques, Isaac Adriance, Thomas Addis Emmet, Gideon Lee, Silas E. Burrows, Samuel F. Halsey, Cornelius Harsen and Robert Stewart, with such other persons as shall associate with them for that purpose, are constituted a body politic and corporate, by the name of the New-York and Harlaem Rail-Road Company, with power to construct a single or double rail-road or way, from any point on the north bounds of Twenty-third street, to any point on the Harlaem river, between the east bounds of the Third avenue and the west bounds of the Eighth avenue, with a branch to the Hudson river, between One hundred and twenty-fourth street and the north bounds of One hundred and twenty-ninth street, to transport, take and carry property and persons upon the same, by the power and force of steam, of animals, or of any mechanical or other power, or of any combination of them which the said company may choose to employ; and by that name, they and their successors shall be and they are hereby vested with the right and privilege of constructing, erecting, building, making and using a single or double rail-road or way for the purpose aforesaid, and for the term of thirty years from the passage of this act.

SEC. 2. If the corporation hereby created shall not within six months from the passage of this act, locate the route of said rail-road or way and the branch to the same, and make a survey of such location, and file a map thereof in the register's office of the city and county of New York, and within two years from the passage of this act commence, and within four years from the passage of this act construct, finish, and put in operation the said single or double rail-road or ways, then the said corporation shall thenceforth forever cease, and this act shall be null and void; but no such map shall be filed until the same shall have been submitted to and approved by the common council of the city of New-York; such approbation shall be expressed by a joint resolution of the said common council, declaring their approbation of the map, and of the route of the said rail-road indicated therein.

SEC. 3. The capital stock of the said company shall be three hundred and fifty thousand dollars, and the stock shall

be divided into shares of fifty dollars each, and shall be deemed personal property, transferrable in such manner as the by-laws of said corporation shall direct.

SEC. 4. Isaac Adriance, Mordecai M. Noah, Benjamin Bailey, Moses Henriques, Thomas Addis Emmet, Benson McGown, Silas E. Burrows, Samuel F. Halsey, Cornelius Harsen, and Robert Stuart, shall be commissioners, the duty of whom it shall be, on or before the first Monday of June next after the passing of this act, at some suitable place in the city of New-York, to open books to receive subscriptions to the capital stock of the said corporation, and twenty days' public notice shall be given by the said commissioners of the time and place of opening such books, in one of the public newspapers of the said city; and said books shall be kept open for three days from ten to two o'clock of each day, and within ten days after the said stock shall be subscribed, to give a like notice for a meeting of the stockholders, at such time and place as the said commissioners shall appoint, to choose thirteen directors, and such election shall be then and there made by such of the stockholders as shall attend for that purpose, either in person or by proxy, each share of the capital stock entitling the stockholder to one vote; and the said commissioners shall be inspectors of the first election of directors of the said corporation, and shall certify, under their hands, the names of those duly elected, and deliver over the subscription books to the said board of directors; and the time and place of holding the first meeting of the first directors shall be fixed by the said commissioners, and the said board of directors shall have power to appoint an engineer, and cause such examinations and surveys for the said rail-road to be made as may be necessary to the selection by them of the most advantageous line, course or way for the said way; and the said board of directors shall, after such examinations and surveys shall be made, select and under their hands and seals, designate the line, course or way, which they may deem most advantageous for the said rail-road, one of which certificates shall be filed in the office of the register of the city and county of New-York; which line, course or way, so selected and certified, shall be deemed the line, course or way on which the said corporation shall construct, erect, build or make their single or double rail-road or ways as hereinafter mentioned; the expenses of all which surveys and examinations, and all manner of incidental expenses relating thereto, shall be paid for by the said corporation.

SEC. 5. The commissioners shall proceed to distribute the capital stock of the said corporation among the subscribers thereto; and in case there should be subscriptions to more than the amount of such stock, within the time above pre-

scribed, it shall be the duty of the said commissioners to apportion the same among the subscribers thereto, in such manner as they shall deem most advantageous to the interest of the institution; but no person who shall have subscribed for twenty shares or upwards, shall, upon such distribution, receive less than twenty shares, unless the subscriptions for the said last mentioned or a less number of shares, shall exceed the whole amount of the capital stock; nor shall there be allowed to any one of the commissioners or subscribers, directly or indirectly, or to any one in trust, for him, more than two hundred shares of said stock, if, without such allowance, the whole of the stock be taken up; and if, at the expiration of the third day on which the subscription books shall have been kept open, the whole amount of the capital stock shall not have been subscribed, then the commissioners may subscribe for the remaining shares.

SEC. 6. The said board of directors to be chosen at such meeting, or at such annual election, shall, as soon as may be after every election, choose out of their own number one president, and one other person to be vice-president; and in case of the death, resignation or absence of the president, the vice-president shall preside until the annual election thereafter, or until he shall return, or another president shall be chosen; and in case of the death or resignation of the president or vice-president, or of any director, such vacancy or vacancies may be filled for the remainder of the year, wherein they may happen, by the board of directors; and in case of the absence of the president and vice president, the board of directors shall have power to appoint a president *pro tempore*, who shall have and exercise such powers and functions as the by-laws of the said corporation may provide.

SEC. 7. In case it should at any time happen that an election of directors shall not be made on any day when pursuant to this act it ought to have been made, the said corporation shall not for that cause be deemed to be dissolved, but such election may be held at any other time directed by the by-laws of the said corporation, within sixty days after the day on which it should have been held.

SEC. 8. The said corporation are hereby authorized, by their agents, surveyor, and engineers, to enter upon such route, place or places, to be designated as aforesaid by the said directors, as the line, course, road and way whereon to construct their single or double rail-road or ways; and it shall be lawful for the said corporation to enter upon and take possession of and use all such lands and real estate as may be indispensable for the construction and maintenance of their single or double rail-road or ways, and may also receive, hold and take all such voluntary grants and donations of land and real estate as shall

be made to the said corporation, to aid in the construction, maintenance and accommodation of the said single or double rail-road, or ways, provided that all lands or real estate thus entered and taken possession of and used by the said corporation, and which are not donations, shall be purchased by the said corporation, of the owner or owners of the same, at a price to be mutually agreed upon between them; and in case of a disagreement of price, and before the making of any portion of the road upon said land, the said corporation or the owner of such land may apply by petition to the vice-chancellor of the first circuit, who upon such application shall cause such notice to be given to the other party as he shall deem proper and sufficient, appointing therein the time and place of hearing the parties, at which time and place, upon proof that the notice directed has been given, the said vice-chancellor shall direct the manner of ascertaining the damages which the owner of such land or real estate will sustain by the occupation thereof by the said corporation; and the said vice-chancellor shall appoint three competent and disinterested commissioners, who shall be freeholders and residents of the city of New-York, and who shall, under the direction of the said vice-chancellor, make appraisements and determine said damages and report in writing under their hands to the said vice-chancellor, who shall examine the same and hear the parties in relation thereto if he shall deem it expedient, and increase or diminish the damages if he shall be satisfied injustice has been done. The report shall contain a minute and accurate description of the land appraised. The commissioners shall be allowed three dollars each a day for their services. Upon proof to the said vice-chancellor, to be made within thirty days after his determination of payment to the owner or of the depositing to the credit of the owner in such incorporated moneyed institution, as the said vice-chancellor shall direct, of the amount of said damages and the payment of all expenses, the said vice-chancellor shall make an order or decree, particularly describing the land and reciting the appraisement of damages and the mode of making it, and all other facts necessary to a compliance with this section of this act; and when the said order or decree shall be recorded in the office of the register of the city and county of New-York, the said corporation shall be seized and possessed of the fee simple of all such lands or real estate, and may enter upon, take and use the same for the purposes of the said road.

SEC. 9. In case any married woman, infant, idiot or insane person or non-resident of the state, who shall not appear after such notice, shall be interested in any such land or real estate, the said vice-chancellor shall appoint some competent disinterested person to appear before the said commissioners and act

for and in behalf of such married woman, infant, idiot, insane person or non-resident.

SEC. 10. The said corporation is hereby authorized to construct, erect, build, make and use a single or double rail-road or ways, of suitable width and dimensions, to be determined by the said corporation, on the line, course and way, selected or designated by them in manner aforesaid, and shall have power to regulate the time and manner in which goods and passengers shall be transported, taken and carried on the same, and shall have power to erect and maintain toll-houses and such other buildings for the accommodation of their concerns, as they may deem suitable to their interests: The said corporation shall not take any lands without the consent of the owner or owners thereof, exceeding forty feet in width from east to west, and shall in case of their locating the route of the said rail-road in or along any public street or avenue now laid out on the map or plan of the city of New-York, leave sufficient space in the said street or avenue on each side of the said railroad for a public highway for carriages, and for a side walk for foot passengers.

SEC. 11. Whenever it shall be necessary for the construction of their single or double rail-road or way, to intersect or cross any stream of water or water courses, or any road, street or highway, it shall be lawful for the said corporation, with the consent and approbation of the mayor, aldermen and commonalty of the city of New-York, to construct their single or double rail-road or ways across or upon the same; provided that the corporation shall restore the stream or water course or road, street or highway thus intersected, to its former state, or in a sufficient manner not to have impaired its usefulness, and shall moreover erect and maintain sufficient fences upon the line of the route of their single or double rail-road or ways.

SEC. 12. It shall be lawful for the company hereby incorporated, from time to time to fix, regulate and receive the tolls and charges by them to be received for transportation of property or persons on the single or double rail-road or ways aforesaid, hereby authorized to be constructed, erected, built, made and used.

SEC. 13. If any person or persons shall wilfully do or cause to be done any act or acts whatever, whereby any building, construction or work of the said corporation, or any engine, machine or structure, or any matter or thing appertaining to the same shall be stopped, obstructed, impaired, weakened, injured or destroyed, the person or persons so offending shall forfeit and pay to the said corporation double the amount of damages sustained by means of such offence or injury, to be recovered in the name of the said corporation, with costs of suit, by action of debt.

SEC. 14. Each subscriber shall pay twenty per cent on the amount subscribed by him, at the time of making such subscription; and it shall be lawful for the directors or a majority of them, to require payment of such other sums of the capital stock at such times and in such proportions and on such conditions as they shall deem fit, under the penalty of the forfeitures of all previous payments thereon, and shall give notice of the payments thus required, and of the place and time when the same are to be paid, at least thirty days previous to the payment of the same, in a public newspaper published in the city of New-York.

SEC. 15. The said corporation shall possess the general powers, and be subject to the general restrictions and liabilities prescribed by such parts of the eighteenth chapter of the first part of the Revised Statutes as are not repealed.

SEC. 16. Nothing in this act shall be deemed to authorize the said corporation to construct or use their single or double rail-road or way across or along any of the streets or avenues as designated on the map of the city of New-York, whether such streets or avenues shall have been opened or not, without the consent of the mayor, aldermen and commonalty of said city, who are hereby authorized to grant permission to the said corporation to construct their said rail-road or way across or along said streets or avenues, or prohibit them from constructing the same, and after the same shall be constructed, to regulate the time and manner of using the same, and the speed with which carriages shall be permitted to move on the same or any part thereof; and nothing in this act contained shall prevent the legislature from granting to any other corporation or persons, the right of constructing a rail-road or roads parallel with the one herein mentioned, or any part of it, on any lands, street, road or avenue not occupied by the rail-road or way hereby authorized, or the right of crossing or intersecting the same at any point or points, without making compensation for injuries sustained thereby.

SEC. 17. No person who shall at the time be a member of either branch of the common council of the city of New-York, shall act as commissioner or director of said corporation under this act.

SEC. 18. The legislature may at any time alter, amend, modify or repeal this act.

CHAP. 274.

AN ACT to alter the map or plan of the city of New-York.
Passed April 27, 1837.

The People of the State of New-York, represented in Senate and Assembly, do enact as follows:

SEC. 1. All that part of Forty-First-street lying between the Fifth and Sixth avenues; also all that part of Sixty-Eighth-street lying between the Third and Fourth avenues; also all those parts of Eightieth, Eighty-First, Eighty-Second, Eighty-Third, Eighty-Fourth and Eighty-Fifth-streets lying between the Sixth and Seventh avenues, as the same are laid out and designated on the map or plan of the city of New-York, are hereby discontinued on the said map or plan.

SEC. 2. The Fourth avenue shall be continued and extended on the said map or plan from Sixty-Sixth-street to Sixty-Eighth-street. Also Avenue A and the First, Second, Third and Fourth avenues shall be respectively continued and extended on the said map or plan from One Hundred and Sixth-street to One Hundred and Ninth-street. Also One Hundred and Seventh and One Hundred and Eighth-streets shall be respectively continued and extended on the said map or plan from the Fifth avenue to the Harlaem river. And the owner or owners of the lands and tenements which shall be included in any blocks or plots of ground to be formed by such extension and continuation of the said avenues and streets, respectively, shall have, hold, occupy, possess and enjoy the same, in like manner as he, she or they would have been entitled to do if the said avenues and streets had been originally so extended and continued on the said map or plan; and whenever the said avenues or streets, or any or either of them, shall be opened, the damage and benefit shall be estimated, assessed and paid, in like manner as the same would have been done if the said avenues and streets had been originally so extended and continued.

SEC. 3. All that part of the Fourth avenue in the city of New-York, lying between Thirty-Fourth-street, and the Harlaem river, shall be widened on the map or plan of the said city, by adding thereto, on each side thereof, twenty feet of land, so as to make the whole width of that part of the said avenue one hundred and forty feet.

SEC. 4. The said part of the Fourth avenue so to be widened is hereby declared to be one of the avenues of the city of New-York in like manner and with the like effect as if the same had been so laid out by the commissioners appointed in and by the act, entitled "An act relative to improvements touching the laying out of streets and roads in the city of New-York, and for other purposes," passed April 3d, 1807.

CHAP. 143.

AN ACT to amend an act entitled "An act relating to the New-York and Harlem Railroad Company," passed May 7, 1840, and the acts amending the same.

Passed March 29, 1848.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

* * * * *

Sec. 6. The New-York and New-Haven Railroad Company is hereby authorized to enter upon and run their cars and engines for passengers, freights, mails, expresses and other business, over the road of the New York and Harlem Railroad Company, from the point of junction of the roads of said companies at or near William's bridge, in the county of Westchester, to the city of New-York, and as far into said city as the said Harlem railroad may extend, upon such terms and to such point as has been or may hereafter be agreed upon by and between said companies; a copy of such agreement or agreements to be duly authenticated and filed in the office of the secretary of state of this state; and to take, transport and convey persons and property upon the said Harlem railroad, by the power and force of steam or animals or any mechanical power or combination of the same.

CHAP. 387.

AN ACT to extend the charter of the New York and Harlem Railroad Company, and to determine the mode of using the same in the streets of New York.

Passed April 16, 1859.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The New York and Harlem Railroad Company are hereby authorized, pursuant to the ordinance of the mayor, aldermen and commonalty of the city of New York, passed December twenty-seventh, eighteen hundred and fifty-eight, and approved December thirty-first, eighteen hundred and fifty-eight, to lay down a double track or railway from their track in the Fourth avenue, at Forty-second street, up said street to Madison avenue, and up Madison avenue to Seventy-ninth street, for the use of their small cars only.

SEC. 2. The New York and Harlem Railroad Company is hereby authorized, empowered and permitted to use steam in the drawing of their passenger and freight cars, upon their railroad on the Fourth avenue, to and from the northern extremity of Manhattan or New York island, to the south side of Forty-second street, in said city, with turnouts to their en-

gine-houses, respectively, for a period of thirty years from the thirty-first day of December, eighteen hundred and fifty-eight.

SEC. 3. All the rights, privileges and franchises given and granted to the New York and Harlem Railroad Company, in and by their act of incorporation, passed April twenty-fifth, eighteen hundred and thirty-one, and the several acts amending the same, subject to all the restrictions imposed by said several acts, except as herein modified, are hereby extended for the term of thirty years from the passage of this act. Nothing in this act shall be construed to prevent the legislature at any future time from rescinding, altering or amending this act, or the privileges hereby granted.

SEC. 4. This act shall take effect immediately.

CHAP. 880.

AN ACT for the protection of persons traveling upon Fourth avenue, in the city of New York.

Passed May 10, 1867; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The New York and Harlem railroad company shall within two years from the passage of this act, construct up to the grade of Fourth avenue, in the city of New York, a substantial stone or brick wall, with suitable coping upon each side of their road, upon a line not exceeding twenty-six feet in the clear at any point of measurement below the tunnel at Ninety-second street in said city, and from the north side of Seventy-ninth street to the south side of Eighty-eighth street, where the road bed or track is below the grade of the avenue, and where the same is not arched or covered, and shall also, within said period, erect upon said wall (except at street crossings, where bridges are, or shall be constructed) a substantial iron fence for the protection of persons using said avenue, said wall and fence to be so finished and constructed, as shall be approved by the engineer of the Croton aqueduct board. Said wall shall extend as high above the grade of the avenue as the said engineer shall direct, and the railing thereon shall be not less than three feet in height; and one-half of said wall in lineal feet shall be constructed within one year from the date of the passage of this act, and the balance in two years.

SEC. 2. Within two years after the passage of this act, The New York and Harlem Railroad Company shall construct and complete an arch of masonry work over the track of the road of said company, in the Fourth avenue of the city of New York, from the south line of Eighty-eighth street to and connecting with the rock cut so called on Ninety-second street, in the said city. The said arch shall be constructed of such ma-

terial, and of such thickness, and of such strength and in such manner in all respects as the engineer of the Croton aqueduct board shall prescribe. Whenever the said company shall have expended the sum of twenty-five thousand dollars in the prosecution of the said work, and shall produce to the comptroller of the city of New York the certificate of the said engineer to that effect, the said comptroller shall draw his warrant in favor of the said company upon the treasury of the said city, and deliver the said warrant to the said company for the sum of twelve thousand five hundred dollars, and so on from time to time as often as the said company shall have expended a like sum of twenty-five thousand dollars, and shall produce the like certificate of the said engineer, the said comptroller shall draw his warrant in favor of the said company and deliver it to the said company, upon the treasury of the said city for the like sum of twelve thousand five hundred dollars. And when the said company shall have fully completed the said arch to the full satisfaction and approval of the said engineer, and shall produce his certificate to that effect and of the last installment expended by the said company in the construction thereof to the said comptroller, the said comptroller shall draw his warrant in favor of the said company and deliver the same to the said company for one-half of the amount of such last installment. The said several warrants shall be paid out of any moneys in the treasury of the said city raised and appropriated for roads and avenues. The construction of the said arch shall be commenced on or before the first day of July next, and one-half thereof shall be completed in one year from the said first day of July next, and the balance in two years from the passage of this act. Nothing in this act contained shall be held or construed to oblige the said company to fill in and grade and level over and about the said arch, but filling in and grading and levelling over and about the same shall be done by the mayor, aldermen and commonalty of the said city.

SEC. 3. It shall be the duty of the city authorities of the city of New York, now vested with the power of regulating and grading the streets and avenues of said city, to regulate and put in good condition said avenue, and fill in the spaces behind said walls as rapidly as they shall be constructed by said railroad company.

SEC. 4. If the said railroad company shall fail to comply with any of the provisions of this act, they shall be liable to a penalty of two hundred and fifty dollars for each and every day said failure to comply shall continue, unless said engineer shall certify that said railroad company have used due diligence in prosecuting said work, which penalty, with costs, shall be sued for by the district attorney of the county of New York, in the name of the people of the State, in any court of

record in said county, and which penalty, when recovered, shall be paid by said district attorney, as follows: one-half of said penalty to the informer, and the other half to the commissioners of charities and corrections, to be used by them in such manner, for the benefit of the persons under their charge, as they shall deem best.

SEC. 5. Nothing in this act contained shall be construed as in any manner extending or increasing the rights of said railroad company, or as depriving the common council of the city of New York of any powers now possessed by it, except as specially herein provided.

SEC. 6. The legislature may at any time amend or repeal this act.

SEC. 7. This act shall take effect immediately.

CHAP. 702.

AN ACT to improve and regulate the use of the Fourth avenue in the city of New York.

Passed May 14, 1872; three-fifths being present.

The people of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The New York and Harlem Railroad Company is hereby authorized and required to regulate the grade of their railroad in the Fourth avenue of the city of New York, and to construct such viaducts, foot and road bridges over the same, and such excavations and tunnels under the same, with openings for proper ventilation, for the purpose of rendering the same safe and convenient to any persons crossing the same, and the railroad trains and passengers traveling thereon, in the following manner, namely: At Forty-fifth and Forty-eighth streets, to construct tunnels under the said streets and the Fourth avenue for sidewalks and carriage ways underneath the railroad at least thirty-four feet wide, or bridges over the railroad of at least that width, for the same purpose, and at Forty-sixth, Forty-seventh and Forty-ninth streets tunnels under the said streets and the Fourth avenue, or bridges over the same, at least twelve feet in width, for foot passengers. Said tunnels or bridges shall have easy approaches, and the tunnels shall be dry and thoroughly ventilated and lighted. Between Forty-eighth and Forty-ninth streets the grade of the railroad shall commence to descend, and shall descend as rapidly as the operation of the road will permit, so that at Fifty-sixth street the grade of the railroad shall be thirteen feet six inches below the grade of the avenue; and from thence to Ninety-sixth street the road shall run through a covered way, with openings in the coverings not to exceed one hundred and fifty feet in length, and twenty feet in width in each block;

and thence continuing upon the present grade to the center of One Hundred and Fifth street, and thence descending at the rate of about forty feet to the mile to the center of One Hundred and Twentieth street, where the said grade shall be fourteen feet one inch below the grade of the avenue; thence descending at the rate of about twelve feet and four-tenth of a foot to the mile to the center of One Hundred and Twenty-ninth street, where said railroad grade shall be eleven feet below the grade of the avenue; thence ascending at the rate of twenty-six feet and four-tenths of a foot to the mile to the center of One Hundred and Thirty-third street to and upon the present grade of the railroad; the grade of said road at Fifty-ninth street shall not exceed fifteen feet six inches below the grade of the said avenue as established by law. At Seventy-fourth street it shall not exceed thirteen feet six inches, and at Seventy-ninth street shall not exceed twelve feet. At Fiftieth and Fifty-first streets, elevated bridges of iron for foot passengers shall be constructed over the railroad. Between Fifty-second and Fifty-third streets a bridge shall be constructed for foot passengers and carriages over the railroad, with approaches parallel with the railroad, and at Fifty-fourth and Fifty-fifth streets bridges of iron shall be constructed for foot passengers over the railroad; and from Ninety-eighth street to One Hundred and Fifteenth street, the railroad shall be carried upon a viaduct, with stone arches or iron bridges in said viaduct over the cross or intersecting streets above One Hundred and First street, to and include One Hundred and Thirteenth street. Between One Hundred and Seventeenth and One Hundred and Eighteenth streets, a bridge shall be constructed over the railroad with parallel approaches, the same as before provided between Fifty-second and Fifty-third streets; from One Hundred and Nineteenth street to One Hundred and Twenty-ninth street inclusive, iron bridges over the railroad shall be constructed upon the line of each street the full width of the street. At One Hundred and Thirtieth and One Hundred and Thirty-first streets, iron bridges for foot passengers shall be constructed over said railroad; between Forty-fifth and Forty-ninth streets, including said streets, iron railings or brick walls shall be erected in said streets, outside the railroad tracks, so as to prevent crossing at a level with said railroad tracks. A coping and iron railing shall be constructed upon the parapet and retaining walls along the said improvement, wherever the said roadway runs through an open cut, and also around the openings between Fifty-sixth and Ninety-six streets.

SEC. 2. During the progress of the work, the New York and Harlem Railroad Company is hereby authorized to lay down such additional temporary tracks on the Fourth avenue, above

Forty-second street, as may be necessary for the railroad business during the progress of the work, and such tracks shall be removed when the work shall be completed, and said company is hereby authorized, for the purpose of facilitating rapid transit and accommodating local traffic, to lay down permanently two additional tracks on said avenue, and to make such landings and excavations in said avenue as may be required for such additional tracks, with landings for the entrance and delivery of passengers outside of the said excavations and viaduct.

SEC. 3. Whenever it shall be found advisable or necessary to alter the grade of the streets crossing the said avenue or of the said avenue, where the said road shall pass through a covered way, the same may be done by said company, but so as not to interfere with the free use of the streets by the public.

SEC. 4. The sidewalks on Fourth avenue between Forty-ninth and Fifty-sixth streets, and between Ninety-sixth street and the Harlem river, shall not exceed fifteen feet in width.

SEC. 5. Whenever it shall be necessary in the progress of said work to remove or alter the Croton water pipes, sewers or gas pipes upon said avenue, the same shall be done by the department or corporation having charge thereof, so as not to interfere with said work.

SEC. 6. There shall be a board of engineers, whose duty it shall be to execute, direct and superintend the construction of the said improvement, to be called the board of engineers of the Fourth avenue improvement. It shall be the duty of the said board to file a monthly statement, under oath, of the items of their expenditure with the comptroller of the city of New York. Regular accounts of all their transactions shall be kept by the board, which shall be open to the inspection of the officers of the said railroad company, and to the comptroller of the city of New York. The said board are authorized to pass suitable by-laws for their own regulation and government, and to select a presiding officer and secretary from their own number. They shall keep a record of all their proceedings. The said board shall consist of four members, as follows, namely: Allan Campbell and Alfred W. Craven, or their successors, and the chief engineer of the board of public works of the city of New York for the time being, and the engineer of the New York and Harlem Railroad Company. In case of the death, removal or resignation of the said Campbell or Craven, or their or either of their successors, the vacancy shall be filled by the remaining members of the board. The said board are hereby authorized and directed to take the entire charge and control of the said improvement, and to execute the same in conformity with the provisions of this act, in a substantial

and workmanlike manner. The said engineers shall receive eight dollars each for every day that they shall be employed in the performance of their duties under this act. They may appoint one of their number as a general superintendent of the work. The said board shall prepare plans and specifications of said improvement in conformity with this act, and an estimate of the expense thereof, and file a copy of such plans, specifications and estimate in the office of the comptroller of the city of New York. The members of the said board, before entering upon the performance of their duties shall severally take and subscribe an oath or affirmation before some judge of a court of record in the city of New York, faithfully to perform the trust and duty required of them by this act and as a member of the said board of engineers, which shall be verified by such judge and filed in the office of the said comptroller.

SEC. 7. When the said plan, specifications and estimate shall be made and filed as aforesaid, the expense and cost of the said improvement shall be borne and paid by the New York and Harlem Railroad Company and the mayor, aldermen and commonalty of the city of New York in equal proportion as the construction of the said improvement progresses. When and as often as it shall appear by the certificate of the superintending engineer of the work upon the said improvement that the sum of twenty-five thousand dollars has been expended thereon by the New York and Harlem Railroad Company, specifying the portions and divisions of the said improvement where the said expenditure has been made, the comptroller of the city of New York shall draw his warrant upon the treasury of the said city in favor of the treasurer of the said railroad company for one-half of the said sum, which shall be duly signed and countersigned by the proper officers of the said city, and delivered to the said railroad company for and on account of the one-half of the expense and cost of said improvement to be borne and paid by the said city as aforesaid.

SEC. 8. For the purpose of raising the sum or amount of one-half of the estimated expense and cost of the said improvement, to be borne and paid by the city and county of New York, one-half of the proportion or amount to be borne and paid as aforesaid, or one-fourth of the whole estimated expense and cost, shall be raised by a tax upon the real and personal property subject to taxation in the city and county of New York, and included in the tax levy for the year eighteen hundred and seventy-two, and the remaining sum or one-half of the proportionate amount to be borne and paid by the said city and county shall be raised in like manner and included in the tax levy for the year eighteen hundred and seventy-three. The comptroller of the city of New York is hereby

authorized and directed to issue revenue bonds of the said city, in anticipation of the amount to be raised by taxation for the expense and cost of the said improvement in each year, to provide the means for paying the said proportion of the said city toward the said expense and cost, before the said tax shall be collected, not to exceed the due proportion to be borne and paid by the said city in each of the said years eighteen hundred and seventy-two and eighteen hundred and seventy-three; such bonds to be issued and sold at not less than par. So much of the proceeds of the said tax for each of the said years as may be necessary for the purpose shall be applied to the payment of the revenue bonds to be issued as aforesaid. It is hereby intended and declared that the payments by the city of New York are to be made in the proportion and as fast as they are made by the said railroad company during the progress of the work on the said improvement.

SEC. 9. The mayor, aldermen and commonalty of the city of New York are forbidden to obstruct the said improvement or the use of the Fourth avenue for that purpose above Forty-second street; and the said municipal corporation is hereby authorized and directed to pass and adopt such ordinances as may be requisite or necessary to facilitate the said improvement. Said tunnel and railways shall be exclusively for the uses and purposes of said railroad company, and it shall not be lawful for any person or persons, other than a public officer in the execution of his duty, as such, with his agents, and assistants, to enter or pass upon or through the same, or any portion thereof, on foot or in any other way than in the proper cars of this corporation provided for that purpose, without the consent of said corporation, under penalty of fifty dollars for each offense, to be recovered by this corporation.

SEC. 10. The said board of engineers shall begin the said improvement and proceed to the completion thereof with reasonable expedition. When completed the said railroad company are authorized and directed to run by steam their trains (and such trains of other railroads as shall have obtained the consent of the New York and Harlem Railroad Company) over the said improvement and the route of the said railroad, and in and upon their depot at Forty-second street, and the switches, turnout and sidings, now authorized by law, north of said street.

SEC. 11. The Legislature may at any time alter, amend, or repeal this act.

SEC. 12. This act shall take effect immediately.

CHAP. 339.

AN ACT to regulate, improve and enlarge Park avenue above One Hundred and Sixth street in the city of New York, and providing for the passage of intersecting streets, under the railroad structure of the New York and Harlem Railroad Company, and for the elevation of said railroad structure, and for changing the grade of said railroad, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary by reason of such change in structure and grade and increased elevation of bridge, and for other purposes.

Approved by the Governor April 19, 1892. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The grade of the New York and Harlem railroad between One Hundred and Sixth street and the Harlem river, as now established by chapter seven hundred and two of the laws of eighteen hundred and seventy-two, shall be changed and altered as follows: Commencing at or about One Hundred and Sixth street, the grade shall ascend going northwardly at the rate of forty feet per mile to One Hundred and Sixteenth street; and thence the grade shall descend, going northwardly, at the rate of twenty-four and seven-tenths feet per mile to One Hundred and Twenty-ninth street; thence still descending northwardly at the rate of twenty-nine and six-tenths feet per mile to a point about eighty feet southwardly from the present legally established bulkhead line on the south side of the Harlem river; thence going northwardly, the grade over the Harlem river shall be level at an elevation of twenty-six feet above high-water line of spring tides, to a point about eighty feet north of the present legally established bulkhead line, on the north side of the Harlem river; thence descending on a grade of not exceeding thirteen feet per mile to a point twenty feet south of the south line of One Hundred and Thirty-eighth street; thence still descending northwardly on a grade of not exceeding thirty-seven feet per mile to the south line of One Hundred and Forty-fourth street; thence still descending on a grade not exceeding twenty-nine feet per mile to the level of the roadbed of the New York and Harlem railroad, as now legally established and constructed, at or about the south line of One Hundred and Forty-ninth street.

SEC. 2. The viaduct structure, as it now exists between One Hundred and Sixth and the south side of One Hundred and Eleventh streets, shall be adapted to the new grade line as established by the preceding section, by raising its parapet

walls, and filling in with earth or other materials between the same, to the height required by the new grade; and from the south side of One Hundred and Eleventh street to the Harlem river, the railroad tracks and roadbed shall be carried on a viaduct structure of iron or steel, or of both of these materials combined, consisting of three lines of plate girders, supported on columns of iron or steel, standing on suitable pedestals of stone or brick masonry, with foundations under the same of timber piling, or concrete, as may be found necessary.

SEC. 3. The present depressed cut of the railroad, extending from One Hundred and Fifteenth street to One Hundred and Thirty-third street shall be filled in with earth or other suitable material, and its parapet walls taken down below the line of the under side of the avenue paving; and the bridge which now carries One Hundred and Sixteenth street, the roadway between One Hundred and Seventeenth and One Hundred and Eighteenth streets, the bridges which carry one Hundred and Nineteenth, One Hundred and Twentieth, One Hundred and Twenty-first, One Hundred and Twenty-second, One Hundred and Twenty-third, One Hundred and Twenty-fourth, One Hundred and Twenty-fifth, One Hundred and Twenty-sixth, One Hundred and Twenty-seventh, One Hundred and Twenty-eighth and One Hundred and Twenty-ninth streets over the said depressed cut, also the foot bridges over the same at One Hundred and Thirtieth and One Hundred and Thirty-first streets shall be removed, and the space between the exterior lines of the said parapet walls shall form a part of Park avenue, and be paved with stone paving of the same character and description as Park avenue is now paved, and shall be laid in accordance with the grades of Park Avenue, as now established, and the iron bridges which now carry the railroad tracks over One Hundred and Twelfth and One Hundred and Thirteenth streets shall also be removed, or be raised to the new grade line.

SEC. 4. The new viaduct structure of iron or steel, provided for by section two, shall be built at such height that all streets from and inclusive of One Hundred and Twelfth street to the Harlem river, shall be passed over with a clear height of not less than fourteen feet above the surface of the pavement, and One Hundred and Fourteenth, One Hundred and Fifteenth, One Hundred and Seventeenth, One Hundred and Eighteenth, One Hundred and Thirtieth, One Hundred and Thirty-first, One Hundred and Thirty-second, One Hundred and Thirty-third streets and the exterior street along the bulkhead of the south side of the Harlem river, which do not now cross the said railroad, shall be opened, regulated and paved, and shall pass under the new viaduct structure the same as provided for all other streets in this section.

SEC. 5. The supporting columns of the new viaduct structure shall divide it into spans of about sixty-five feet center to center longitudinally with the railroad and be disposed in groups of three transversely at right angles, one column on the center line of the railroad, and one column on each side of said center line at a distance not to exceed twenty-eight feet each way between the center of said columns, excepting that at the crossings of One Hundred and Sixteenth and One Hundred and Twenty-fifth streets, and the exterior street (being one hundred feet in width) columns may be erected on the center line of said streets and also on the curb lines; and the said columns shall not exceed twenty-four inches by twenty-four inches of extreme external diameter above the level of the street pavement and shall be protected at their bases on the pavement with circular cast-iron wheel guards of sufficient diameter to defend the shafts of said columns from abrasion.

SEC. 6. The railroad tracks shall be carried on a solid tight floor, and the drainage water shall be conducted by pipes into the sewers.

SEC. 7. The New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company, is hereby authorized and permitted, at its election, to erect station-houses on both sides of the railroad at One Hundred and Twenty-fifth street, with platforms extending from the north line of One Hundred and Twenty-fourth street to the south line of One Hundred and Twenty-sixth street; and for the support of the girders to sustain such stations and platforms, columns may be erected along the curb lines of Park avenue, between One Hundred and Twenty-fourth and One hundred and Twenty-Sixth streets, and on the curb lines of One Hundred and Twenty-fifth street east and west of Park avenue as may be necessary, the said station columns not to exceed fifteen inches square in size above the surface of the pavement. The said stations and platforms shall be reached by stairs not less than five feet in width, which shall terminate on the side-walk pavement on both sides of One Hundred and Twenty-fifth street, east and west of Park avenue, and also upon the pavement on both sides of Park avenue adjacent to the north line of One Hundred and Twenty-fourth street and the south line of One Hundred and Twenty-sixth street. The station-houses may be built over the roadway of One Hundred and Twenty-fifth street, and may be of a length equal to the distance between the curb lines of the same.

SEC. 8. The Harlem river shall be crossed by the four tracks of the said railroad on a pivot draw-bridge, the center of which shall coincide with the center of the draw-bridge now standing, but the new bridge shall be so built that the lowest part of its structure shall have a clear height of twenty-four feet above

high water of spring tides, and shall provide passageway for vessels on both sides of the center pier, each of one hundred feet width in clear, measured at right angles to the axis or current of the river at the point of its passage under this bridge; the extreme ends of the draw-bridge shall be sustained on abutments of stone masonry, and a protection pier of proper width, to effectually protect the structure of the draw-bridge, when swung open for the passage of vessels, may be built in the river on a line parallel with the direction of the current of the river, no part of which, however, shall in any way diminish the clear width of one hundred feet passageway on both sides of the same.

SEC. 9. From the north abutment of the Harlem river bridge the new grade of the railroad shall be carried on a viaduct structure consisting of parallel retaining walls of stone masonry, with earth filling, to the south side of One Hundred and Thirty-eight street, with suitable openings for the passage of One Hundred and Thirty-fifth street and Mott avenue; over which streets the railroad shall pass on bridges of iron or steel supported on stone abutments; the railroad tracks shall be carried over One Hundred and Thirty-eight street on a bridge of iron or steel, of one hundred feet in width, divided into three spans consisting of one clear span over the roadway between the curb lines, and with side spans over each of the sidewalks supported on stone masonry abutments built upon the north and south lines of said street, and by iron columns on the curb lines.

SEC. 10. In order to secure fourteen feet clear of headroom under the lowest part of the bridge carrying the railroad tracks over One Hundred and Thirty-eight street, the grade level of One Hundred and Thirty-eight street as now established, shall be altered and be depressed under the said bridge, one and one-half feet, and the bridge which now carries One Hundred and Forty-fourth street over the depressed tracks of the New York and Harlem railroad may be raised to a height not exceeding seven and one-half feet above its elevation as now constructed, and the grades of the streets and avenues forming the approaches to the said bridge, that is to say, on One Hundred and Thirty-eight street between Mott avenue and Railroad avenue, and on One Hundred and Forty-fourth street eastwardly and westwardly from the railroad bridge, and on Railroad avenue northwardly and southwardly from One Hundred and Forty-fourth street, shall be altered and changed to correspond with the depression of One Hundred and Thirty-eighth street grade, and the raising of One Hundred and Forty-fourth street bridge, in such manner as may be prescribed by the municipal authorities having jurisdiction in the premises.

SEC. 11. North of the north abutment of One Hundred and

Thirty-eighth street bridge to One Hundred and Forty-ninth street the roadbed of the railroad may be raised to its new grade level by filling of earth, or in any other way, at the discretion of the railroad company.

SEC. 12. The New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company, during the making of the change in the elevation of the aforesaid structure and bridge is authorized to construct a temporary bridge over the Harlem river and to maintain such temporary structures as may be found necessary for the operation of its road, and to occupy any part or parts of any public streets or avenues in the city of New York necessary for such purposes, all of which, however, shall be done under the approval, direction and sanction of the board hereinafter appointed.

SEC. 13. There shall be a board whose duty it shall be to execute, direct and superintend the construction of the said improvement from One Hundred and Sixth street to the line of the Harlem river or point at which the new bridge over the Harlem river, authorized by this act to be constructed, shall commence, which board shall be called "The Board for the Park Avenue Improvement above One Hundred and Sixth Street." It shall be the duty of the said board to file a monthly statement under oath of the items of its expenditures with the comptroller of the city of New York. Regular accounts of all its transactions shall be kept by the board, which shall be open to the inspection of the officers of the said railroad company and to the comptroller of the city of New York. The said board is authorized to pass suitable by-laws for its own regulation and government, and to select a presiding officer and secretary from its number. It shall keep a record of all its proceedings. The said board shall consist of five members, to be appointed by the mayor of the city of New York, two of whom shall be civil engineers experienced in railroad and bridge construction. In case of the death, removal or resignation of any member of the said board, or their or either of their successors, the vacancy shall be filled by appointment by the mayor of the city of New York. The said board is hereby authorized and directed to take the entire charge and control of the said improvement from One Hundred and Sixth street to the line of the Harlem river, or the point at which the new bridge over the Harlem river authorized by this act, to be constructed shall commence, and to execute the same in conformity with the provisions of this act, in a substantial and workmanlike manner. Such work shall be done, so far as possible, by contract. Advertisements shall be made as the board shall direct, for bids or proposals for the work proposed from time to time to be contracted, and the contracts

shall be awarded to the lowest responsible bidder who shall be approved by the board. The contractors shall be required to give such bonds for the faithful performance and execution of the work as the said board shall require. Each member of the board shall receive ten dollars for every day that he shall be employed in the performance of his duties under this act. The board may appoint one of its number as a general superintendent of the work. The said board shall prepare plans of said improvement in conformity with this act, which when approved by the commissioner of public works shall be filed in the office of the comptroller of the city of New York. The said board shall also file with the comptroller specifications and an estimate of the cost of said work. The members of the said board before entering upon the performance of their duties, shall severally take and subscribe an oath or affirmation before a judge of a court of record of the city of New York, faithfully to perform the trusts and duties required of them by this act and as a member of the said board, which oath shall be filed in the office of the comptroller of the city of New York. All work to be done upon or under any street, between One Hundred and Sixth street and the south line of the Harlem river shall be done under the supervision of the department of public works, and the commissioner of public works shall appoint necessary inspectors and engineers for the supervision of such work, who shall be paid a reasonable compensation to be included in the cost of said improvement.

SEC. 14. When the said plan, specification and estimate shall be made and filed as aforesaid, the expense and cost of the said improvement shall be borne and paid by the New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company, and the mayor, aldermen and commonalty of the city of New York, in equal proportions as the construction of the said improvement progresses.. When and as often as it shall appear by the certificate of the superintending engineer of the work of the said improvement, duly certified by the aforesaid board, that the sum of twenty-five thousand dollars has been expended thereon by either of said railroad companies, specifying the portions and divisions of the said improvement where the said expenditure has been made, the comptroller of the city of New York shall draw his warrant upon the treasury of the said city in favor of the treasurer of the said railroad company bearing and paying said expense, for one-half of the said sum, which shall be duly signed and countersigned by the proper officers of said city, upon whom by law is devolved the duty of signing and countersigning warrants, and deliver it to the said railroad company for and on account of the one-half of the

expense and cost of the said improvement to be borne and paid by the city as aforesaid; but in no event shall the proportion of the cost of said improvement to be paid by the city of New York, exceed the sum of seven hundred and fifty thousand dollars, and if the cost of said improvement shall exceed the sum of one million five hundred thousand dollars, then the entire excess over and above such sum shall be borne and paid by the New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company.

SEC. 15. For the purpose of raising the sum or amount of the cost of the said improvement to be borne and paid by the city of New York, it shall be the duty of the comptroller and other proper officers of the city of New York to borrow, from time to time, by the issue of bonds, bearing such rates of interest as they may deem proper, not exceeding four per centum per annum, payable semi-annually, such sums as may be necessary to pay the one-half part of all amounts called for by the certificates of the superintending engineer provided for in the preceding section of this act. Such bonds shall be known as assessment bonds for the Park avenue improvement above One Hundred and Sixth street. Such bonds shall be issued by the comptroller, when authorized by the board of estimate and apportionment, at not less than par, for such period as said comptroller may determine, not exceeding five years. Such bonds shall be sold by the comptroller by inviting proposals therefor by public advertisement for not less than ten days, and the same shall be awarded to the highest bidder therefor, and said proposals shall be only publicly opened by the comptroller in the presence of the commissioners of the sinking fund, or such of them as shall attend at the time and place specified in the advertisement therefor. The comptroller with the approval of said commissioners, shall determine what, if any, of such proposals shall be accepted, and upon the payment into the city treasury of the amounts due by the persons whose bids are accepted respectively, certificates therefor shall be issued to them as authorized by law.

SEC. 16. Upon the completion of such work and final payment by the comptroller of the proportion of the cost of said improvement to be borne by the city of New York, the mayor, aldermen and commonalty of the city of New York by the counsel to the corporation of said city, is hereby authorized and directed to make application to a special term of the supreme court in and for the first department, for the appointment of commissioners of assessment, and the said court shall thereupon name three discrete and disinterested persons, being citizens of the city of New York, as such commissioners of assessment, for the purpose of performing the duties herein-

after mentioned in that behalf prescribed. Twenty days' notice of such applications shall be published in the City Record and in at least two other newspapers published in the city of New York. Upon the appointment of said commissioners, they shall severally take and subscribe an oath or affirmation before some officer authorized to administer oaths, faithfully to perform the trusts and duties required of them by this act, which oaths shall be annexed to and filed with their report. In case of the death, resignation or refusal to act of any such commissioner of assessment, it shall and may be lawful for the court aforesaid, or any one of the justices thereof, on the application of the mayor, aldermen and commonalty of the city of New York as often as such event shall happen, to appoint a discreet and disinterested person, being a citizen of the city of New York, as such commissioner of assessment in the place and stead of such commissioner so dying, resigning or refusing to act, and the surviving or acting commissioners, as the case may be, shall have full power to proceed in the execution of their duties under their appointment until a successor of such commissioner so dying, resigning or refusing to act shall be appointed. It shall be the duty of said commissioners to view the improvement provided for by the terms of this act from One Hundred and Sixth street north to the Harlem river, and all such lands, tenements, hereditaments and premises as they may ultimately include within the area of assessment that may be fixed and determined by them, and shall proceed to determine the area upon which an assessment shall be imposed sufficient to meet and pay the entire amount of the assessment bonds which may be issued in pursuance of the provisions of section fifteen of this act, together with interest on such bonds to the date of the levying of such assessment, or such portion of said bonds and interest as the said commissioners of assessment shall determine should be paid by assessment. It shall and may be lawful to and for the said commissioners of assessment in their discretion, if they deem it equitable and just so to do, but not otherwise, to assess the whole or any part of the said bonds and interest upon the mayor, aldermen and commonalty of the city of New York. Any area of assessment shall be made so as to include all such lands, tenements, hereditaments and premises as may by said commissioners be deemed to be benefited by the said improvement, and no others; and having fixed such area and the amount of said bonds, and the interest thereon to be paid by assessment, it shall be the duty of the said commissioners to make a just and equitable assessment of the benefit to the respective owners, lessees, parties and persons respectively entitled unto or interested in the lands, tenements, hereditaments and premises included within the said area or assessment.

In each and all and every case and cases where owners or parties interested, or their respective estates and interests are unknown or not fully known to the said commissioners, it shall be sufficient for them to estimate and to set forth and state in their report in general terms the respective sums to be paid, without specifying the names of the estates or interests of such owners, proprietors or parties interested, or either of them. On the coming in of the said report, signed by said commissioners, or a majority of them, the said supreme court shall, by order, upon the application of the mayor, aldermen and commonalty of the city of New York, after hearing any matter which may be alleged against the same, either confirm the said report in whole or in part, or refer the same back to the same commissioners for revisal or correction, or to new commissioners to be appointed by the said court to reconsider the subject-matter thereof, and the said commissioners to whom the said report shall be so referred shall return the said report corrected and revised, or a new report to be made by them as aforesaid in the premises, to the said court, without unnecessary delay; and the same, on being so returned, shall be confirmed or again referred back by the said court as justice shall require; and such report, when confirmed by the said court, shall be final and conclusive as well upon the said mayor, aldermen and commonalty of the city of New York as upon the owners, lessees, persons or parties interested therein and entitled to the lands, tenements, hereditaments and premises mentioned in the said report, and also upon all other persons whomsoever.

SEC. 17. The said commissioners of assessment, at least thirty days before they present their report to the supreme court, shall deposit a true copy or transcript of the same in the office of the comptroller of the city of New York, for the inspection of whomsoever it may concern, and shall give daily notice, by advertisement in the newspapers mentioned in the sixteenth section of this act, for thirty days after depositing such report as aforesaid, of the said deposit thereof in the said office, and of the day on which such report will be presented to the said court; and any person or persons whose rights may be affected thereby and who may object to the same or any part thereof, may, within thirty days after the first publication of such notice, set forth their objections to the same in writing to the said commissioners, who shall, after hearing the parties so objecting, thereupon reconsider their said assessment or part or parts thereof so objected to, and in case the same shall appear to them to require correction, and not otherwise, they shall and may correct the same accordingly. The said commissioners shall include in said report the amount of their fees, and all costs and disbursements for expenses, for surveys, maps and other things.

SEC. 18. In each and every case of the appointment of commissioners under this act, it shall be competent and lawful for any two of such commissioners so appointed as aforesaid, to proceed and to execute and perform the trusts and duties of their said office, and their acts shall be as valid and effectual as the acts of all the commissioners so to be appointed, if they had acted together, would have been; and further, in all cases, the acts, proceedings and decisions of a major part of such of the commissioners as shall be acting in the premises shall be as binding, valid and effectual, as if the said commissioners appointed for such purpose had all concurred and joined therein. The commissioners appointed under and by virtue of this act, who shall enter upon the duties of their appointment, shall each be entitled to receive such compensation as shall be awarded by the court upon the confirmation of their respective reports, not exceeding ten dollars for each day they shall respectively be actually employed in the duties of their appointment, besides all reasonable expenses to be taxed and allowed by said court for maps, surveys, clerk hire and all necessary expenses and disbursements, and the same shall be included in and considered and paid as part of said assessment.

SEC. 19. The respective sums so as aforesaid assessed by the said commissioners upon the owners and occupants and parties seized or possessed of or interested in the lands, tenements, hereditaments and premises mentioned in the report of said commissioners, and reported by said commissioners as and for the payment to be made by the parties and persons respectively in the said report mentioned or referred to, and intended as owners and proprietors of or parties interested in lands and premises deemed to be benefited for the benefit and advantage to be derived from the said improvement, shall be a lien or charge on the lands, tenements, hereditaments and premises in the said report mentioned, or upon the estate and interest of the respective owners, lessees and parties interested in said lands, tenements, hereditaments and premises, for or on account of which the said respective sums shall be so assessed by said commissioners upon the respective owners and proprietors thereof, and parties interested therein; as well the said owners and proprietors thereof and parties interested therein, and also the occupants, and each and every of them, shall, moreover, be respectively liable to pay on demand the respective sum or sums or assessments mentioned in said report at which the respective lands, tenements, hereditaments and premises so owned and occupied by him, her or them, or wherein he, she or they are interested, or at which the owners or proprietors thereof shall be so assessed, to such person or persons as the comptroller of the city of New York shall appoint to receive the same. The said respective sums or

assessments, with lawful interest from the date of the confirmation of the report, may be collected, with all costs and charges by action of the said mayor, aldermen and commonalty of the city of New York from and against the parties assessed, or the owner or owners of the respective lands, tenements, hereditaments and premises whereof or in respect of which the same may be assessed or set forth in the said report of the said commissioners, or from or against any or either of the said parties or owners without joining any other or others of them, the said parties or owners.

SEC. 20. The moneys collected pursuant to the provisions of sections sixteen, seventeen, eighteen and nineteen of this act shall be set apart, when collected, as a trust fund, to apply to the redemption of the principal and interest of the bonds for the payment of which said assessment shall have been imposed. In the event that the said commissioners of assessment shall have, in pursuance of the provisions of section sixteen of this act, assessed the payment of the whole or any part of said bonds upon the mayor, aldermen and commonalty of the city of New York, the funds to pay the same shall be raised by tax upon the real and personal property subject to taxation in the city and county of New York, and included in the tax levy for the years in which the said bonds shall fall due. The interest on all of the said bonds shall be paid by the city of New York until the same shall fall due, and the amount thereof shall be raised from year to year, by tax upon the real and personal property subject to taxation in the city and County of New York but any interest that may accrue upon the aforesaid trust fund shall be applied in payment of said interest, and from the time that said trust fund shall be established, the balance of the interest only over and above the amount that may be earned from said trust fund shall be raised by taxation as aforesaid.

SEC. 21. The new bridge over the Harlem river, authorized to be constructed, by the provisions of this act, and the approaches to such bridge authorized to be constructed on the north side of the Harlem river in the twenty-third ward, shall be constructed at the sole expense of the New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company. The said railroad company shall prepare plans and specifications of said bridge and its approaches on the north side in the twenty-third ward in conformity with this act, and file a copy of such plans and specifications in the office of the comptroller of the city of New York. The said corporation is authorized and empowered to conform the structure of the said bridge to such plans and directions as shall be approved and given by the secretary of war, pursuant to authority conferred upon him by act of con-

gress, and except so far as the structure of said bridge shall be subject to the direction of said secretary of war, the plan therefor, and the approaches thereto on the north side in the twenty-third ward, shall be approved by the board appointed in pursuance of the provisions of this act.

SEC. 22. All changes in the railroad necessary to conform the grade thereof on the north side in the twenty-third ward, when elevated as aforesaid, to the new elevation, are hereby authorized and directed, and all grades of the said railroad established by any prior act or acts, or by any contract made by the railroad company owning, or leasing and operating said railroad, or by both, with any public department of the city of New York, or with the city of New York, pursuant to any act of the legislature, are hereby changed to conform to the provisions of this act.

SEC. 23. All bridges over the New York and Harlem railroad required to be made by any act or contract pursuant to any act of the legislature of the state of New York which will be interfered with by the change in grade of said railroad required by the provisions of this act, are hereby authorized to be removed except the bridge at One hundred and Forty-fourth street, which is authorized to be raised as aforesaid, and the obligation to make and continue the same, as imposed by any act or part of any act, or by any contract made pursuant to any act of the legislature of the state of New York, is hereby removed and annulled, anything in any act of the legislature of the state of New York, or in any contract made pursuant to any act of the said legislature of the state of New York, with any public department of the city of New York, or with the city of New York, to the contrary notwithstanding.

SEC. 24. The mayor, aldermen and commonalty of the city of New York, is hereby authorized and directed to pass and adopt such ordinances as may be requisite or necessary to facilitate the said improvement. Said improved structure and bridge shall be exclusively for the uses and purposes of the railroad company, and it shall not be lawful for any person or persons, other than a public officer in the execution of his duty as such, with his agents, or assistants, to enter or pass upon or through the same or any portion thereof, on foot or in any other way than in the proper cars of such corporation provided for that purpose, without the consent of said corporation, under a penalty of fifty dollars for each offense, to be recovered by said railroad corporation.

SEC. 25. The cost of the construction of all stations upon said railway, whether provided for in this act or not, shall be borne by the said railroad corporations or either of them, and shall not be included in the estimate to be made by said board of the cost of the proposed improvement from One Hundred

and Sixth street to the Harlem river, or the point at which the new bridge over the Harlem river authorized by this act to be constructed, shall commence.

SEC. 26. Said board shall begin the said improvement and proceed to the completion thereof with reasonable expedition. When completed, the New York and Harlem Railroad Company and its lessee, the New York Central and Hudson River Railroad Company so long as it remains such lessee, are authorized and directed to run by steam their trains and such trains of other railroad companies as shall have obtained permission therefor voluntarily given by either one of said companies which may be operating said railroad, over the said improvement and the route of the said railroad, and in and upon the depot at Forty-second street, and the switches, turnouts and sidings now authorized by law north of said street; and no trains of other companies, without such permission, shall be run thereon.

SEC. 27. The board appointed pursuant to the provisions of this act shall act upon any and all questions by a majority vote of its members.

SEC. 28. This act shall take effect immediately.

CHAP. 548.

AN ACT to amend chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two, entitled "An act to regulate, improve and enlarge Park avenue above One Hundred and Sixth street in the city of New York, and providing for the passage of intersecting streets under the railroad structure of the New York and Harlem railroad company, and for the elevation of said railroad structure, and for changing the grade of said railroad, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary by reason of such change in structure and grade and increased elevation of bridge, and for other purposes."

Became a law May 8, 1894, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section four of chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two is hereby amended to read as follows:

SEC. 4. The new viaduct structure of iron or steel, provided for by section two, shall be built at such height that all streets from and inclusive of One Hundred and Eleventh street to the

Harlem river, shall be passed over with a clear height of not less than fourteen feet above the surface of the pavement, and One Hundred and Fourteenth, One Hundred and Fifteenth, One Hundred and Seventeenth, One Hundred and Eighteenth, One Hundred and Thirtieth, One Hundred and Thirty-first, One Hundred and Thirty-second, One Hundred and Thirty-third streets and the exterior street along the bulkhead of the south side of the Harlem river, which do not now cross the said railroad, shall be opened, regulated and paved, and shall pass under the new viaduct structure the same as provided for all other streets in this section.

SEC. 2. Section fourteen of chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two is hereby amended to read as follows:

SEC. 14. When the said plans, specifications and estimate shall be made and filed as aforesaid, or when any amended plans, specifications and estimate authorized by law shall be so filed, the expense and cost of the said improvement shall be borne and paid by the New York and Harlem railroad company, or its lessee, the New York Central and Hudson river railroad company, and the mayor, aldermen and commonalty of the city of New York, in equal proportions as the construction of the said improvement progresses. When and as often as it shall appear by the certificate of the superintending engineer of the work of the said improvement, duly certified by the aforesaid board, that the sum of twenty-five thousand dollars has been expended thereon by either of said railroad companies, specifying the portions and divisions of the said improvement where the said expenditure has been made, the comptroller of the city of New York shall draw his warrant upon the treasury of the said city in favor of the treasurer of the said railroad company bearing and paying said expense, for one-half of the said sum, which shall be duly signed and countersigned by the proper officers of said city, upon whom by law is devolved the duty of signing and countersigning warrants, and deliver it to the said railroad company for and on account of the one-half of the expense and cost of the said improvement to be borne and paid by the city as aforesaid; but in no event shall the proportion of the cost of the said improvement to be paid by the city of New York exceed the sum of seven hundred and fifty thousand dollars, and if the cost of said improvement shall exceed the sum of one million five hundred thousand dollars, then the entire excess over and above such sum shall be borne and paid by the New York and Harlem railroad company, or its lessee, the New York Central and Hudson river railroad company, except, nevertheless, that the mayor, aldermen and commonalty of the city of New York shall also bear and pay, in the manner in the act hereby amended

provided for, one-half of the expense of all work made necessary and done pursuant to any amended plans and specifications made and filed as provided for by this amendment to said act, in excess of the cost and expense of constructing or carrying out the said improvement in accordance with the plans and specifications heretofore made and filed; and the New York and Harlem railroad company, or its lessee, the New York Central and Hudson river railroad company, shall bear and pay, in the manner in the act hereby amended provided for, the remaining one-half of the said cost and expense; and the certificates of payment by either of said railroad companies, in this section hereinbefore provided for, to be made by the superintending engineer of said improvement, duly certified to by the aforesaid board, to cover any expense or cost that may be made necessary by any such amended plans and specifications, shall state the fact that the expense and cost in the said certificate specified was made necessary by such amended plans and specifications, and said certificates shall be conclusive evidence of such fact. But nothing herein contained shall be construed to obligate the city of New York to pay as its share of the work done under such amended plans and specifications a greater sum than fifty thousand dollars of such additional expense.

SEC. 3. In addition to the powers conferred upon the board for the Park avenue improvement above One Hundred and Sixth street, by chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two, the said board may, at any time within three months after the passage of this act, amend the plans, specifications and estimates of that part of the said improvement between the south side of One Hundred and Eleventh street and the south side of One Hundred and Fifteenth street, so that the space between the exterior lines of the retaining walls of the present railroad structure and between the south line of One Hundred and Eleventh street and the south line of One Hundred and Fifteenth street shall form a part of Park Avenue, and be paved as provided in section three of said chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two, and such amended plans, when approved by the commissioner of public works, shall be filed in the office of the comptroller of the city of New York. In such case the said board shall also file with the comptroller amended specifications of said work between the south side of One Hundred and Eleventh street and the south side of One Hundred and Fifteenth street in accordance with such amended plan; and an amended estimate of the cost of the entire work between One Hundred and Sixth street and the Harlem river, according to such amended plans and specifications. Upon the filing of such amended plans, specifications and estimate, the plans, specifications and estimate

heretofore made and filed shall be deemed to be amended accordingly. And the said board is hereby authorized, without advertisement, to make such supplemental contract or contracts, or such contract or contracts modifying any contract or contracts heretofore made by the said board with any contractor or contractors for any part of the work between the south side of One Hundred and Eleventh street and the south side of One Hundred and Fifteenth street, as may be necessary, in order to have the said work done in accordance with such amended plans, specifications and estimate. Nothing herein contained shall authorize the said board to change the grade of the New York and Harlem railroad between One Hundred and Sixth street and the Harlem river, as fixed and established by section one of chapter three hundred and thirty nine of the laws of eighteen hundred and ninety-two.

SEC. 4. This act shall take effect immediately.

CHAP. 594.

AN ACT to further amend chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two, entitled "An act to regulate, improve and enlarge Park avenue above One Hundred and Sixth street in the city of New York, and providing for the passing of intersecting streets under the railroad structure of the New York and Harlem Railroad company, and for the elevation of said railroad structure, and for changing the grade of said railroad, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary by reason of such change in structure and grade and increased elevation of bridge, and for other purposes."

Accepted by the city.

Became a law May 13, 1896, with the approval of the Governor. Passed three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section seven of chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two, is hereby amended to read as follows:

SEC. 7. The New York and Harlem Railroad company, or its lessee, the New York Central and Hudson River Railroad company, is hereby authorized and directed, to erect and maintain a station at One Hundred and Twenty-fifth street, and for that purpose to erect and maintain a station building in Park avenue, extending from the north line of One Hundred and Twenty-fifth street to the south line of One Hundred and Twenty-sixth street, forty feet in width, with suitable stair-

ways on the easterly and westerly sides thereof, not exceeding five feet in width. The northerly and southerly center line of the said station building shall be the centre line of Park avenue. Suitable sidewalks and curbs shall be laid on each end and side of the said station building, and there shall be left a clear roadway, between the curb on the easterly side of Park avenue and the curb on the easterly side of the said station building and between the curb on the westerly side of the said station building and between the curb on the westerly side of Park avenue and the curb on the westerly side of the said station building, of twenty-six and one-half feet in width. For the purposes of the said station at One Hundred and Twenty-fifth street, the said viaduct structure shall be of such width as may be necessary for the construction and maintenance of suitable platforms and station buildings between the tracks, and for the necessary approaches to such platforms and station buildings, but not to exceed eighty-two feet in width, except that the cross girders to sustain such platforms, station buildings and approaches, may be supported on columns erected along the curb lines of Park avenue between One Hundred and Twenty-third street and One Hundred and Twenty-seventh street, the said columns not to exceed fifteen inches square in size above the surface of the pavement. Suitable stairways, not exceeding five feet in width, shall also be erected and maintained from the south side of One Hundred and Twenty-fifth street to the said platforms and station buildings between the tracks. The plan of the said improvement heretofore approved by the commissioner of public works of the city of New York and filed in the office of the comptroller of the city of New York on the twelfth day of November, eighteen hundred and ninety-two, as amended and modified by the plan approved by the commissioner of public works of the city of New York, and filed in the office of the comptroller of the city of New York, on the twenty-first day of June, eighteen hundred and ninety-four, is, and shall be deemed to be, hereby amended and modified to conform to the provisions of this section, and as so amended and modified, is hereby authorized, ratified and confirmed, and the said, the New York and Harlem Railroad company, or its lessee, the New York Central and Hudson River Railroad company, is hereby authorized to take down so much of the structure heretofore erected between One Hundred and Twenty third street and One Hundred and Twenty-seventh street in accordance with the said plan of the said improvement filed in the office of the comptroller of the city of New York, on the twelfth day of November, eighteen hundred and ninety-two, as is not necessary or required for the purposes of the station in this section provided for.

SEC. 2. This act shall take effect immediately.

CHAP. 613.

AN ACT relating to and to further amend chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two, entitled "An act to regulate, improve and enlarge Park avenue above One hundred and Sixth street in The City of New York, and providing for the passage of intersecting streets, under the railroad structure of the New York and Harlem Railroad Company, and for the elevation of said railroad structure, and for changing the grade of said railroad, and for the construction of a new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary by reason of such change in structure and grade and increased elevation of bridge, and for other purposes," as amended by chapter five hundred and forty-eight of the laws of eighteen hundred and ninety-four and by chapter five hundred and ninety-four of the laws of eighteen hundred and ninety-six, and transferring all the powers of "the board for the Park avenue improvement above One hundred and Sixth street" to the commissioner of highways of The City of New York on and after the tenth day of March, eighteen hundred and ninety-eight.

Accepted by the city.

Became a law April 29, 1898, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. On the tenth day of March, eighteen hundred and ninety-eight, "the board for the Park avenue improvement above One hundred and Sixth street" created pursuant to chapter three hundred and thirty-nine of the laws of eighteen hundred and ninety-two, shall deliver to the commissioner of highways of The City of New York all records, books, papers and maps in its office, or under its control, and upon the said tenth day of March, eighteen hundred and ninety-eight, the term of office of the said "the board for the Park avenue improvement above One hundred and Sixth street" and of each member thereof shall expire, and said board shall cease to exist on that day,

SEC. 2. From and after the said tenth day of March, eighteen hundred and ninety-eight, all the power and duties imposed or conferred upon the said "the board for the Park avenue improvement above One hundred and Sixth street" by the said act, or any amendment thereof, are hereby transferred to, and shall be devolved upon, and shall be performed by, the commissioner of highways of The City of New York.

SEC. 3. Nothing herein contained shall in any manner impair or affect any contract heretofore made by or with the said "the board for the Park avenue improvement above One Hundred and Sixth street," and any contract and all rights thereunder heretofore made by or with the said board, may be enforced in the name of "The City of New York" by the said commissioner of highways in the same manner and to the same extent that any such contract or any such rights thereunder might or could have been enforced by the said board under and pursuant to the provisions of the said act hereby amended or otherwise.

SEC. 4. Nothing herein contained shall relieve The New York and Harlem Railroad Company, or its lessee, The New York Central and Hudson River Railroad Company, from any costs, charges or expenses imposed upon the said railroad companies, or either of them, in and by the act hereby amended, or impose upon The City of New York any costs, charges or expenses not imposed by the said act hereby amended.

SEC. 5. This act shall take effect immediately.

CHAP. 425.

AN ACT to provide for further regulation of the terminals and approaches thereto of the New York and Harlem railroad at and north of Forty-second street in the city of New York and of the public highway structures over said terminals and approaches and of the motive power to be used on said railroad.

Accepted by the city.

Became a law, May 7, 1903, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Upon the approval and filing by the board of estimate and apportionment of the city of New York of the plans and profiles provided for in section three of this act, and the delivery of the grant provided for in section two of this act, the New York and Harlem Railroad company, and its lessee the New York Central and Hudson River Railroad company, are and each of them is hereby authorized and directed to depress all of the existing tracks of the New York and Harlem Railroad company between Fifty-seventh street and Forty-second street, and Madison avenue and Lexington avenue, in the city of New York, to such grade, and to construct all tracks hereafter laid within the said limits or boundaries at such grades as will enable the city of New York to

carry Forty-fifth street, Forty-sixth street, Forty-seventh street, Forty-eighth street and Forty-ninth street, across said tracks by suitable viaducts or bridges at a grade or grades not exceeding four per centum; and also to carry Fiftieth street, Fifty-first street, Fifty-second street, Fifty-third street, Fifty-fourth street, Fifty-fifth street and Fifty-sixth street across said tracks by suitable viaducts or bridges at normal grade. The said railroad corporations are and each of them is hereby authorized to make such alterations and changes in existing structures erected pursuant to chapter seven hundred and two of the laws of eighteen hundred and seventy-two, south of Fifty-ninth street, as may be necessary or reasonably required in carrying out the provisions of this act. The said railroad corporations are and each of them is hereby authorized, subject to the provisions of the building code of the city of New York, to make alterations, changes or additions in and to the passenger depot buildings, heretofore constructed between Forty-second street, Forty-fifth street, Vanderbilt avenue and Depew place, or to remove the said passenger depot buildings, or any part thereof, and to reconstruct the same or to construct new buildings to such an extent and in such manner as may be necessary or reasonably required in the proper management and conduct of their business, upon the said land bounded by Forty-second street, Forty-fifth street, Vanderbilt avenue and Depew place.

§ 2. In order to enable the said railroad corporations to depress their tracks as hereinbefore provided, and to permit the operation of trains otherwise than by steam locomotives as hereinafter required, the city of New York, acting by its board of estimate and apportionment, is hereby authorized and empowered to grant to the said railroad corporations, by suitable instrument or instruments in writing, the right to occupy and use, for the purposes of their incorporation, during the term or terms of their corporate existence; the sub-surface of Park avenue from Forty-fifth street to the southerly line of Fifty-sixth street; the sub-surface of Park avenue, bounded and described as follows: beginning at the point where the southerly line of Fifty-sixth street intersects the easterly line of Park avenue and running thence in a northwesterly direction to a point in the centre line of Fifty-seventh street thirty-three feet easterly from the centre line of Park avenue; thence westerly along the centre line of Fifty-seventh street sixty-six feet; thence in a southwesterly direction to the point where the southerly line of Fifty-sixth street intersects the westerly line of Park avenue, and thence easterly to the place of beginning; Forty-fifth street, from the easterly line of Vanderbilt avenue to the westerly line of Depew place; the sub-surface of Forty-sixth

street, from the easterly line of Madison avenue to the westerly line of Lexington avenue; the sub-surface of Forty-seventh street, from the easterly line of Madison avenue to the westerly line of Lexington avenue; the sub-surface of Forty-eighth street, from a line described as follows: beginning at a point in the northerly line of Forty-eighth street, distant one hundred sixteen and sixty-seven one-hundredths feet easterly from the easterly line of Madison avenue; thence southerly parallel with Madison avenue fifteen feet; thence in a southwesterly direction to a point in the southerly line of Forty-eighth street, distant sixty feet easterly from the easterly line of Madison avenue; to the westerly line of Lexington avenue; the sub-surface of Forty-ninth street, bounded and described as follows: beginning at a point in the northerly line of Forty-ninth street, distant fifty-three feet westerly from the westerly line of Park avenue, and running thence southerly parallel with Park avenue fifteen feet; thence in a southwesterly direction to a point in the southerly line of Forty-ninth street, distant sixty-five feet westerly from the westerly line of Park avenue; thence easterly along the southerly line of Forty-ninth street, to a point distant one hundred seventy-five feet westerly from the westerly line of Lexington avenue; thence in a northwesterly direction to a point in the northerly line of Forty-ninth street, distant two hundred and twenty-six feet westerly from the westerly line of Lexington avenue; thence westerly to the place of beginning; and the sub-surface of Fiftieth street, between the westerly line of Park avenue and the following described line: beginning at the intersection of the northerly line of Fiftieth street with the easterly line of Park avenue, and running thence in a southeasterly direction to a point in the southerly line of Fiftieth street, distant sixty feet easterly from the easterly line of Park avenue. Nothing in this act contained shall be held to create a fee in said railroad corporations, or either of them, in or to the soil of said portions of said streets or of Park avenue, or any part thereof; nor to prevent the city of New York from occupying or using, or from permitting others to occupy or use any part of the said soil of said portions of said streets or avenue underneath the tracks and structures of the said railroad corporations as shown on the plans and profiles provided for in section three of this act in any manner which shall not interfere with or endanger the occupation or use by the said railroad corporations.

§ 3. The New York Central and Hudson River Railroad company shall prepare plans and profiles of the viaducts or bridges required to carry the said streets, from Forty-fifth street to Fifty-sixth street, both inclusive, over the tracks of

the said railroad and to carry the central portion of Park avenue from Forty-ninth street to Forty-fifth street over the said tracks, and on such plans and profiles shall be shown the grade or depth to which the tracks and structures of the said railroad corporations are to be constructed underneath such viaducts or bridges. The said bridges or viaducts shall in every case, except as hereinafter provided, be fifty feet in width. They shall be so constructed as to leave sufficient clearance above the tracks when depressed as above provided, for the free passage and operation of the cars of the railroad companies using the said tracks, and the grade of the roadway of such viaducts or bridges shall not exceed four per centum. The New York Central and Hudson River Railroad company shall, within thirty days after the day on which this act shall take effect submit the said plans and profiles in duplicate to the board of estimate and apportionment of the city of New York for its approval. If such plans and profiles are approved by the board of estimate and apportionment, such approval to be evidenced by a resolution adopted by a majority of the votes in said board, a copy of such resolution, duly certified by the mayor and comptroller of the city of New York, shall be endorsed upon, or annexed to, each copy of such plans and profiles; and one copy of such plans and profiles, so approved, shall be filed with the board of estimate and apportionment of the city of New York, and the other copy shall be delivered to the New York Central and Hudson River Railroad company. Upon such plans and profiles or any modifications thereof made as hereinafter provided being approved and filed as aforesaid, any and all alterations or changes in streets, avenues or public places, or in the grade or grades, width or widths thereof, and any and all modifications in or of the use of any existing street, avenue, highway or public place, or any part thereof, shown upon said plans and profiles shall be deemed to have been duly authorized, and the map or plan of the city of New York, shall be deemed to have been changed accordingly without any further act or proceeding by or on the part of the city of New York, or of any officer, board or department thereof; and all such interests or easements in any lands of or owned by the said railroad corporations, or either of them, as shall be necessary or reasonably required for the construction of such viaducts or bridges shall thereupon be deemed to be vested in the city of New York. The said board of estimate and apportionment shall thereupon cause three copies of such plans and profiles to be made and filed, one in the office of the register of the city and county of New York, one in the office of the corporation counsel of said city, and one in the office of the president of the borough of Manhattan of

said city. The city of New York is hereby authorized to carry and maintain the said streets from Forty-fifth street to Fifty-sixth street, both inclusive, and the said central portion of Park avenue, over the tracks of the said railroad by viaducts or bridges in accordance with the said plans and profiles. The work of constructing such viaducts or bridges in accordance with the said plans and profiles approved as aforesaid by the board of estimate and apportionment, shall be done and performed by the New York Central and Hudson River Railroad company for and on behalf of and as contractor with the said city. For and in consideration of having the use of the portions of said avenue and of the said streets, herein above described, the said railroad corporations shall be at the entire expense of depressing said tracks, and shall pay to the city of New York the sum of twenty-five thousand dollars per annum so long as the said railroad corporations or either of them or their or either of their successors or assigns shall hold, occupy or use the same; and they shall also bear and pay all the expense of constructing said viaducts and bridges, excepting the said Park avenue viaduct, in excess of six hundred thousand dollars. The city of New York shall bear and pay to the New York Central and Hudson River Railroad company in full compensation for its work, labor and services to be rendered as herein provided the sum of six hundred thousand dollars of the cost and expense of constructing the viaducts and bridges carrying said streets from Forty-fifth street to Fifty-sixth street, both inclusive, over said tracks, and also the entire expense of constructing the viaduct carrying Park avenue over the said tracks from Forty-ninth street to Forty-fifth street. The viaduct or bridge required to carry Forty-fifth street over said tracks shall be constructed, either wholly or partly, north of the present north line of said street, and the said board of estimate and apportionment may, in its discretion, require that such viaduct or bridge, or any part thereof, shall be not to exceed seventy feet in width; and in that case the expense of constructing so much of such viaduct or bridge as shall be in excess of fifty feet in width shall be borne and paid by the city of New York. The portion of the expense to be borne and paid by the city of New York as aforesaid shall be paid to the said railroad company at such time or times and in such manner as shall, at or prior to the time of approving and filing the said plans and profiles as hereinbefore provided, be agreed upon by said railroad company and the board of estimate and apportionment of the city of New York. The said railroad corporations shall have the right to construct and maintain on the said viaducts or bridges such signal or other

apparatus as may be required for the safe operation of their road and tracks; but all such apparatus shall be constructed and maintained in such manner as not to obstruct the roadways or sidewalks of such viaducts or bridges or unnecessarily disfigure them. The work of depressing the tracks and constructing the viaducts or bridges hereinbefore provided for shall be commenced within thirty days and completed within five years after the date on which the grant provided for in section two of this act shall be delivered, and the plans and profiles of the said viaducts or bridges shall be approved and filed by the board of estimate and apportionment as hereinbefore provided.

§ 4. From and after the expiration of five years after the approval aad filing of the plans and profiles provided for in section three of this act and the delivery of the grant provided for in section two of this act, it shall not be lawful, except only in case of necessity, arising from the temporary failure of such other motive power as may be lawfully adopted, for any railroad corporation to operate trains by steam locomotives in Park avenue in the city of New York south of the Harlem river. If at any time after the expiration of the said five years trains shall be operated by steam locomotives in said Park avenue south of the Harlem river for a period of more than three days, the railroad corporation so operating such trains shall pay to the city of New York a penalty of five hundred dollars for every day or part of a day during which such trains are so operated, unless the mayor of the city of New York shall certify to the necessity for the use of steam locomotives arising from the temporary failure of other motive power. Such certificate of the mayor may be revoked by him at any time. In any action or proceeding brought by the city of New York against a railroad corporation to recover such a penalty the said certificate of the mayor shall be *prima facie* evidence of the facts therein stated, and the said railroad corporation shall be permitted to allege, as matter of defense, that the mayor's certificate was refused or revoked unreasonably or in bad faith, and in every such case the burden of establishing that defense shall be upon the defendant making that allegation. Such a certificate or the fact of its existence, or nonexistence, shall not be evidence in any action or proceeding except an action or proceeding to recover a penalty as above provided. And the New York and Harlem Railroad company and its lessee, the New York Central and Hudson River Railroad company, so long as it remains such lessee, and the New York, New Haven and Hartford Railroad company, so long as it has any contract or other rights to operate its trains in Park avenue south of the Harlem river, and such other railroad com-

panies as may hereafter obtain permission therefor, are hereby authorized to run their trains by electricity, or by compressed air or by any motive power other than steam and which does not involve combustion in the motors themselves, through the tunnel and over the improvements made pursuant to chapter seven hundred and two of the laws of eighteen hundred and seventy-two, and pursuant to chapter three hundred and thirty-nine of the laws of eighteen hundred ninety-two and the acts amendatory thereof and supplemental thereto, and pursuant to this act, and over the route of the said railroad and in and upon the depot at Forty-second street, and the stations, switches, turn-outs, loops and sidings, and the approaches thereto, now or hereafter authorized by law. No power house constructed to supply power for the purposes of this act (except stations for the transformation of electric current) shall be placed on Manhattan Island more than two blocks from the water front, except with the consent of the board of estimate and apportionment.

§ 5. The New York and Harlem Railroad company, and its lessee, the New York Central and Hudson River Railroad company, are, and either of them is, hereby authorized and empowered to acquire from the city of New York, and the city of New York, acting by the board of estimate and apportionment of said city, is hereby authorized and empowered, in its discretion, to grant to said railroad corporations, or to either of them, any and all lands, or rights, interests or easements in lands in anywise owned, occupied or controlled by the city of New York, within the following territory, namely: beginning at the intersection formed by the westerly line of Lexington avenue and the southerly line of Fiftieth street; running thence westerly along the southerly line of Fiftieth street to the westerly line of Park avenue; thence southerly along the westerly line of Park avenue to the northerly line of Forty-eighth street; thence westerly along the northerly line of Forty-eighth street to the easterly line of Madison avenue; thence southerly along the easterly line of Madison avenue to the northerly line of Forty-second street; thence easterly along the northerly line of Forty-second street to the westerly line of Lexington avenue; and thence northerly along the westerly line of Lexington avenue to the place of beginning, which may be necessary or required for the purpose of making any alterations, changes or additions, other than the alterations, changes and additions authorized by sections one, two and three of this act, in or to the yards and structures forming the terminals of the New York and Harlem Railroad company and the approaches thereto which may be necessary or required for the proper operation of trains in and through the Fourth or

Park avenue tunnel and in and upon the said terminals and the approaches thereto by some motive power other than steam; or which may be necessary or reasonably required in the proper conduct of the business, or in the proper management, maintenance, operation or use of the railroads and property owned or leased of said railroad corporations; provided, however, that all such alterations, changes and additions, other than the alterations, changes and additions authorized by sections one, two and three of this act, in or to the said yard and structures, terminals and approaches thereto, in so far as they shall in any manner affect any public streets, avenues or places, shall be made in accordance with plans and profiles which shall be first submitted by the said the New York Central and Hudson River Railroad company to the board of estimate and apportionment of the city of New York for its approval. If such plans and profiles are approved by the board of estimate and apportionment, such approval to be evidenced by resolution adopted by a majority of the votes in said board, a copy of such resolution, duly certified by the mayor and comptroller of the city of New York, shall be indorsed upon, or annexed to, each copy of such plans and profiles; and one copy of such plans and profiles, so approved, shall be filed with the board of estimate and apportionment of the city of New York, and the other copy shall be delivered to the New York Central and Hudson River Railroad company. Upon such plans and profiles or any modifications thereof made as hereinbefore provided, being approved and filed as aforesaid, any and all alterations or changes in streets, avenues or public places, or in the grade or grades, width or widths thereof, any and all modifications in or of the use of any existing street, avenue, highway or public place, or any part thereof, shown upon said plans and profiles, shall be deemed to have been duly authorized, and the map or plan of the city of New York shall be deemed to have been changed accordingly without any further act or proceeding by or on the part of the city of New York, or of any officer, board or department thereof, and the said board of estimate and apportionment shall thereupon cause three copies of said plans and profiles to be made and filed, one in the office of the register of the city and county of New York, one in the office of the corporation counsel of said city, and one in the office of the president of the borough of Manhattan, of said city. The city of New York acting by its said board of estimate and apportionment is hereby authorized and empowered, in its discretion, to agree with the New York Central and Hudson River Railroad company upon the consideration to be given or the amount of compensation to be paid to such city by such railroad corporation for such lands, rights, interests

or easements in lands as may be granted by said city as in this section provided; and also to grant such lands, rights, interests, or easements in lands to such railroad corporation by proper instrument in writing, either in perpetuity or for the period for which the same shall be required. Any pecuniary compensation agreed upon may either be a gross sum or it may be a sum or sums paid annually during the term of such grant. The New York and Harlem Railroad company, and the New York, New Haven and Hartford Railroad company, may be parties to such instrument. Such instrument shall be executed in as many parts as there shall be parties thereto, and on the part of the city of New York by its mayor and comptroller, under the corporate seal of the city of New York, and by the railroad corporation or corporations, parties thereto, under their corporate seals and by their proper officers. Such instrument may also include such other provisions in respect to carrying such plans and profiles into effect, not inconsistent with this act, as shall be agreed upon by and between the said board of estimate and apportionment and the said railroad corporations. When executed, one copy of such instrument shall be filed in the office of the comptroller of the city of New York, and one copy shall be delivered to each railroad corporation, party thereto. When executed and filed as aforesaid, said instrument shall be binding upon the city of New York and the railroad corporations, parties thereto, their successors and assigns.

§ 6. Upon the approval by the board of estimate and apportionment of any plans and profiles provided for in this act, the said city shall afford to said railroad corporations all such reasonable facilities as may be required to carry into effect the provisions of this act and any plans and profiles, and the provisions of any instrument, authorized by this act; and the proper officers and authorities of such city are hereby authorized, and it shall be the duty of such officers and authorities to take such appropriate action as may be necessary or reasonably required to carry the provisions of this act, and any such plans and profiles, and the provisions of any such instrument, into effect. All sewers, water pipes, gas pipes, electric lines, wires, ducts or conduits in or under the portions of the streets and avenue described in section one of this act, or which may be in, under or over any streets or avenues shown on any such plans and profiles, shall be changed or relocated, at the expense of the said railroad corporations, in such manner and to such an extent as may be necessary or reasonably required to carry the provisions of section one of this act, and any such plans and profiles, and the provisions of any such instrument, into effect; but all such changes and relocations shall be made in a manner approved by the board of estimate and apportionment.

§ 7. The comptroller of the city of New York shall, from time to time, when authorized by the board of estimate and apportionment, and without the concurrence or approval of any other board or public body, prepare and issue corporate stock of the city of New York, for the purpose of bearing and paying such portion of the cost and expense of constructing the viaducts and bridges mentioned in section one of this act, as is provided to be borne and paid by the city of New York.

§ 8. Nothing in this act contained shall have the effect of limiting or impairing in any manner or to any extent the existing rights, privileges or franchises of the railroad corporations, or either of them, now using the said tunnel, terminals and the approaches thereto, or of depriving in any manner or to any extent such railroad corporations, or either of them, of the use and benefit of such rights, privileges and franchises, except in so far only as such rights, privileges or franchises shall be expressly limited or modified by this act or in and by any instrument executed in pursuance hereof; and the said railroad corporations, or either of them, are hereby authorized and empowered to acquire by purchase or by condemnation, from any owner, and to take, hold, occupy and use for the purposes of its incorporation all real estate in fee, and all property and all rights, interests and easements in real estate or other property which may be necessary or reasonably required in order to carry out and into effect the provisions of this act, and any plans and profiles, and the provisions of any instrument or instruments provided for in section three of this act. All the powers in and by this act conferred upon the city of New York, the board of estimate and apportionment of the city of New York, and upon the said railroad corporations, may be exercised from time to time as occasion may require, and any plans and profiles approved and filed as in this act provided may at any time be modified, but not in any manner inconsistent with this act, upon plans and profiles showing any such modifications being submitted, approved and filed in the manner in this act provided.

§ 9. The provisions of any acts and parts of acts, including the Greater New York charter, which are inconsistent with this act, and in so far only as they are inconsistent with this act, shall have no application to the rights, powers and obligations conferred or created by or under authority of this act, or to any proceedings taken hereunder.

§ 10. The state of New York shall not be liable for injuries to persons or property in connection with any railroad or other construction which may be authorized under the provisions of this act, nor shall the state of New York be liable for any damages in any event for any act or omission of the city of

New York, or of the railroad corporations, or of either of them, mentioned in this act.

§ 11. This act shall take effect immediately.

CHAP. 639.

AN ACT to amend chapter four hundred and twenty-five of the laws of nineteen hundred and three, entitled "An act to provide for further regulation of the terminals and approaches thereto of the New York and Harlem railroad at and north of Forty-second street in the city of New York and of the public highway structures over said terminals and approaches and of the motive power to be used on said railroad."

Accepted by the city.

Became a law May 9, 1904, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SEC. 1. Section eight of chapter four hundred and twenty-five of the laws of nineteen hundred and three, entitled "An act to provide for further regulation of the terminals and approaches thereto of the New York and Harlem railroad at and north of Forty-second street in the city of New York and of the public highway structures over said terminals and approaches and of the motive power to be used on said railroad" is hereby amended to read as follows, to wit:

SEC. 8. Nothing in this act contained shall have the effect of limiting or impairing in any manner or to any extent the existing rights, privileges or franchises of the railroad corporations, or either of them, now using the said tunnel, terminals and the approaches thereto or of depriving in any manner or to any extent such railroad corporations, or either of them, of the use and benefit of such rights, privileges and franchises, except in so far only as such rights, privileges or franchises shall be expressly limited or modified by this act or in and by any instrument executed in pursuance hereof; and the said railroad corporations, or either of them, are hereby authorized and empowered to acquire by purchase or by condemnation, from any owner, and to take, hold, occupy and use for the purposes of its incorporation all real estate in fee, and all property and all rights, interests and easements in real estate or other property which may be necessary or reasonably required in order to carry out and into effect the provisions of this act, and any plans and profiles, and the provisions of any instrument or instruments provided for in section three of this

act. All the powers in and by this act conferred upon the city of New York, the board of estimate and apportionment of the city of New York, and upon the said railroad corporations, may be exercised from time to time as occasion may require, and any plans and profiles approved and filed as in this act provided may at any time be modified, but not in any manner inconsistent with this act, upon plans and profiles showing any such modifications being submitted, approved and filed in the manner in this act provided. Any plans and profiles so submitted, approved and filed, which modify the method in this act provided for, of constructing the viaduct or bridge required to carry Forty-fifth street over the said tracks, so as to construct such viaduct or bridge either wholly or partly within the present lines of said street, or which modify the method in this act provided for of carrying Park avenue or any portion thereof from Forty-ninth street to Forty-fifth street over the said tracks shall not be deemed to be in any manner inconsistent with this act; but any modifications of such method are hereby expressly authorized; and in the place and stead of any portion of the viaduct or bridge required to carry the central portion of Park avenue over said tracks, in this act provided for, the New York Central and Hudson river railroad company may prepare and submit, and the board of estimate and apportionment of the city of New York may approve and cause to be filed in the manner and with the effect provided in section three of this act, plans and profiles of and for a viaduct or bridge not less than fifty feet in width, to be constructed westerly of the westerly line of Park avenue, and parallel thereto, and of and for another viaduct or bridge of equal length, and not less than fifty feet in width, to be constructed easterly of the easterly line of Park avenue and parallel thereto; and in case said two viaducts or bridges shall be constructed as a substitute for the viaduct or bridge, or any portion thereof, required to carry the central portion of Park avenue over said tracks in this act provided for, provision may be made for connections with one or both of such viaducts or bridges with any viaduct or bridge which the city of New York may construct for carrying the central portion of Park avenue from the northerly line of Fortieth street to the northerly line of Forty-second street; and in that case the said railroad corporations or either of them shall construct all of the said viaducts or bridges and connections north of Forty-second street, and the city of New York shall pay such part of the expense of the construction of said viaducts or bridges and connections as shall be agreed upon by and between the said railroad corporations or either of them and the said board of estimate and apportionment; and in any such case the said board of estimate and appportionment is hereby authorized and empowered, in its

discretion, to agree with the New York and Harlem railroad company, or its lessee, the New York Central and Hudson river railroad company, as to the use of such portion of Park avenue, lying between any such two viaducts or bridges, as shall be discontinued, or as to the use of any lands, rights, interests or easements in the lands forming any part of said discontinued portion of Park avenue, and by proper instrument in writing may grant to the said railroad corporations, or to either of them, any such lands, rights, interests or easements in lands, in exchange for the lands, rights, interests or easements in lands required for such viaducts or bridges; and the said board of estimate and apportionment is also in any such case hereby authorized to agree with the said railroad corporations, or either of them, from time to time as to the traffic which shall be allowed or permitted upon such viaducts or bridges and any roadways or driveways connecting the same.

SEC. 2. This act shall take effect immediately.

Supreme Court.

THE PEOPLE *ex rel.* THE NEW YORK AND HARLEM RAILROAD COMPANY, *against* WILLIAM F. HAVEMEYER, Mayor of the City of New York. } 47 How. Pr. 494, September Term, 1874.

(495) WESTBROOK, *J.*: The New York and Harlem Railroad Company was created by a special act of incorporation, passed April 25, 1831, and various acts amendatory thereof and supplemental thereto, have since been enacted.

Prior to the passage of the act of 1872 (to enforce a duty devolved upon the respondent thereby, as is alleged, is the object of this application), the relator had located, constructed and operated a double-track railroad upon the Fourth avenue, in the city of New York. This was with the consent of the corporation of the city.

By chapter 387 of the Laws of 1859, entitled "An act to extend the charter of the New York and Harlem Railroad Company, and to determine the mode of using the same in the streets of New York," the corporation was "authorized, empowered and permitted to use steam in the drawing of their passenger and freight cars, upon their railroad on the Fourth avenue, to and from the northern extremity of Manhattan or New York Island to the south side of Forty-second street in said city, with turn-outs to their engine houses, respec-
(496) tively, for a period of thirty years from the 1st day of December, 1858."

Section 3 of the act just referred to "extended for the term of thirty years from the passage of this act, all the rights, privileges and franchises given and granted to the New York and Harlem Railroad Company, in and by their act of incorporation, passed April 25, 1831, subject to all the restrictions of the said act, except as herein modified."

Prior to the said act of 1859, the relator occupied the streets of New York with their railroad track, under a contract with the city, which bore date January 9, 1832. That contract enabled the common council of that city to determine when the railroad should become an obstruction and impediment to the enjoyment of the streets by the public, and to direct the railroad company to provide a remedy therefor under the penalty of the removal of its track.

When the Fourth avenue was originally occupied in part by the railroad, the sparseness of the population was such that such occupation gave but little inconvenience. As the city, however, expanded northward, it was found necessary to provide remedies for the danger and obstruction to the general public resulting from such occupation; and, with a view to a partial remedy, at least, by a law passed in 1867 (*chapter* 880), a portion of the avenue was arched over, leaving the railroad track below, at the joint expense of the city and the company. According to the evidence contained in the moving papers (and this is not denied), the completion of the work authorized by the act of 1867, was of great benefit; not only to the railroad company but to the city; so much so that it was deemed advisable to improve and grade the entire avenue, and, by means of sinking the tracks at points where it was practicable and bridging the avenue at others, to make the use thereof by the railroad company compatible with its proper use as a street by the public. To carry out this scheme the law of 1872, under which this proceeding is pending, was passed.

(497) By the first section of the act just referred to, the nature and character of the work which "the New York and Harlem Railroad Company is * * * authorized and required to" do is specified.

The second section authorizes the laying down of "such additional temporary tracks on the Fourth avenue, above Forty-second street, as may be necessary for the railroad business during the progress of the work;" and after providing for the removal of such temporary tracks when the work should be completed, it further authorized the company, "for the purpose of facilitating rapid transit and accommodating local traffic, to lay down permanently two additional tracks on said avenue, and to make such landings-excavations in said avenue as may be required for such additional tracks, with landings

for the entrance and delivery of passengers outside of the said excavations and viaduct."

By the sixth section, a board, to be called "the board of engineers of the Fourth avenue improvement," was created, to take charge of, manage and direct the work. It is made the duty of such board "to file a monthly statement, under oath, of the items of their expenditure, with the comptroller of the city of New York." By the same section, the members of the board are named, "Allen Campbell, Alfred W. Campbell, or their successors, and the chief engineer of the board of public works of the city of New York, and the engineer of the New York and Harlem Railroad Company"; directions are given for the keeping of minutes of their transactions; their compensation is fixed; provision is made to fill vacancies, and for the appointment of a general superintendent of the work. They are required to prepare plans and specifications of the improvement "and an estimate of the expense thereof, and file a copy of such plans, specifications and estimates in the office of the comptroller of the city of New York." And they were further required to take an oath, or affirmation, faithfully to perform their duties.

(498) Section 7 provides that one-half of the cost of the work shall be borne by the New York and Harlem Railroad Company, and one-half by the city, as the work progresses, and, "when, and as often as it shall appear, by the certificate of the superintending engineer of the work upon said improvement, that the sum of $25,000 has been expended thereon by the New York and Harlem railroad (specifying the portions and divisions of the said improvement), when the said expenditure has been made the comptroller of the city of New York shall draw his warrant upon the treasury of the said city in favor of the treasurer of the said railroad company for one-half of the said sum, which shall be duly signed and countersigned by the proper officers of the said city, and delivered to the said railroad company for and on account of the one-half of the expense and cost of said improvement, to be borne and paid by the said city, as aforesaid."

Section 8 provides that the one-half of the estimated cost of the improvement which is to be borne by the city shall be raised by taxation upon the real and personal property, and one-half thereof shall be included in the tax-levy of 1872, and the other half in the tax-levy of 1873. The comptroller of the city is directed to issue revenue bonds to meet the amount to be paid by the city; and the section thus concludes: "it is hereby intended and declared that the payments by the city of New York are to be made in the proportion, and as fast as they are made by the said railroad company, during the progress of the work or the said improvement."

By the ninth section the city of New York is "forbidden to obstruct the said improvement, or the use of the Fourth avenue for that purpose, above Forty-second Street"; and the common council is "directed to pass and adopt such ordinances as may be requisite or necessary to facilitate the said improvement."

By the tenth section the board of engineers is charged with completing the improvement as rapidly as possible, and when completed the New York and Harlem Railroad Company
(999) and such other companies as obtain from it a right so to do, are authorized to run trains, by steam, over the various tracks, &c.

After the passage of this act the relator proceeded, under the direction of the said board of engineers (which board has pursued each and every step required by the law to be taken) to make the improvement.

The city of New York raised by tax, including it in its tax-levy of 1872, one-quarter of the whole estimated cost of the improvement; and there was collected and paid into the treasury of the city, the sum of $1,580,767.50, to meet its share of the cost of the work.

By the act of April, 1873, payments by the corporation of the city of New York must be made through the proper disbursing officer of the department of finance, on vouchers, to be filed in said department, by means of warrants drawn on the chamberlain by the comptroller and countersigned by the mayor. Connected with the finance department is an audit bureau, which, under the supervision of the comptroller, is required to audit, revise and settle all accounts in which the city is concerned as debtor or creditor, the chief officer of which is called the auditor of accounts.

On the 14th day of May, 1874, a certificate, precisely in conformity with the provisions of the act under which the improvement is making, was made out by the superintending engineer, and delivered to the comptroller of the city of New York, certifying that $276,466.70 had been expended upon the improvement, specifying the portions and divisions of the same where the expenditure was made.

The auditor of the bureau of accounts (Abraham L. Earle) having duly examined the certificate, certified a claim for one-half thereof to the comptroller, which latter officer drew a warrant for one-half the amount of the certificate of the superintending engineer, to wit: for $138,233.35, and duly signed the warrant; which warrant was also countersigned by the mayor.

(500) After the mayor (William F. Havemeyer) had countersigned the warrant, which, as before stated, was also signed by the comptroller (Andrew H. Green) he caused his

name to be taken therefrom, and now refuses to countersign the same, though he has been requested so to do.

The money wherewith to pay the said warrant was then, and is now, in the treasury of the city, and the application by the relator is for a peremptory mandamus against the respondent, to compel him to countersign the said warrant.

No disputed question of fact arises upon this application; no question of fraud, collusion or attempt to cheat the city out of a dollar is urged. There is no pretense but that the board of engineers has honestly, conscientiously and impartially done its duty, and that the warrant drawn by the comptroller which the mayor now refuses to countersign, represents just one-half the money actually and judicially expended by the relator in making the improvement required by the law of 1872. On the contrary, the opposition to the mandamus is based upon three grounds only: First, that a mandamus is not the appropriate remedy; second, that the certificate includes the cost of temporary tracks for running trains during the progress of the work, and sundry other items which, though lawful and authorized by the statute of 1872, are not proper to be charged to the cost of the improvement, for one-half of which the city is liable; and, third, that the law is unconstitutional, for sundry reasons and on various grounds urged and stated upon the argument, and which will be noticed in detail hereafter.

The full statement of the facts, which has been given, readily shows that there is here no question of fact to be sent to a jury for trial, and therefore, no alternative mandamus need be granted. The amount of money due from the city has been adjusted, determined and ascertained by a tribunal specially organized and created for that purpose, and which, composed as it was of men of conceded integrity, ability and learning, acting under the sanctities of an oath, was infinitely
(501) better qualified to discharge that duty than any court or jury possibly could be. Unlike a court, which, to ascertain facts, must rely upon the evidence of others, this board had personal knowledge of the truth and right of their judgment, the work having been done under their supervision and according to their plans. Unless, then, this application must fail and be defeated for the objections taken and hereinbefore stated, there is no reason why this court should not and ought not to dispose of the whole case, as involving questions of law only, and, if its views coincide with the position of the relator, grant the writ asked for in a peremptory form.

The objection that a mandamus was not the proper remedy was argued preliminarily and disposed of prior to hearing the argument upon the merits. It may not be improper, however, as this case is one of great interest, to state, briefly, the reasons which influenced that decision.

Assuming the validity of the act of 1872, the doing the work, the honest expenditure of the money and all the facts set out in the moving papers (all of which must be assumed in disposing of this preliminary objection), a plain duty was imposed upon the respondent by the statutes of this state—one which was imperative and mandatory—the non-discharge of which worked gross wrong and injustice to the relator. No other remedy was adequate and proper to meet the case. The taxpayers, and all the officers of the corporation, other than the respondent, had faithfully and completely discharged their various duties. The money had been collected and paid into the city treasury, the auditor, under the direction of the comptroller, had certified to the justice of the claim; the comptroller had drawn his warrant for the amount, and the only obstacle to its payment was the want of a countersignature by the mayor, who (all this must be conceded in asking a refusal of the writ on this ground), without reason and without cause, declines to affix his name to a warrant, which the law declares he shall do. What other remedy will meet this case? Granting for the sake of argument, that (502) an action could be maintained against the corporation, for labor performed and moneys expended, under the act (which, as the law specially provides for the ascertainment of the claim, the mode of raising the money and its payment, I do not believe), what propriety is there in subjecting the municipality of the city of New York, as well as the relator, to the cost and expense of an action at law, to enforce a claim which every tax-payer and officer thereof, except the mayor, desires to have paid, and has done all in his power to have discharged.

Within every principle which has ever been held upon the writ of mandamus, it must be the proper remedy. No other will reach the evil, and devolve the costs of the proceeding where they belong, if the points urged upon the merits do not justify the mayor in refusing to perform the official act.

The reasons which influenced us in holding that a mandamus is the appropriate remedy in this proceeding, are fully sustained in *The People agt. The Supervisors of Columbia County* (10 Wend., 363), and *The People agt. Mead* (24 N.Y., 114; *see pages* 120, 121, 122, 123). In the latter case, Judge Denio, in commenting upon some decisions which have been strenuously urged to this court, says: "But I do not think these cases are fully in point against the plaintiff. None of them present a case of a proceeding prescribed by statute for raising money by a local tax for the benefit of a class of creditors when that proceeding has been carried on according to law nearly to its completion, where it has proved effectual in raising the money from the tax-payers, who were the proper parties charged with

its payment, and when the only step wanting to produce satisfaction to the creditor is the payment of the money so raised into his hands. If the defendants are allowed to persist in refusing to make payment on the ground that the relator has a right of action against the town, the anomaly would be presented of the legal pursuit by a creditor of money owing by the town, which it had already raised and collected
(503) from the tax-payers and placed in the hand of a public officer for the purpose of being paid to its creditors — all in the performance of specific statutory directions—but when, in consequence of the perversity of the official person whose duty it was made to pay it over, it could not be obtained by the creditor." This is the exact course of argument which influenced us in overruling the motion to dismiss the proceeding upon the ground that the remedy asked for—a mandamus—was not the appropriate one; and with a single further citation from the same opinion of judge Denio, in which he comments upon the other case we have cited (*The People agt. The Supervisors of Columbia County*), we close the discussion of this preliminary objection: "If the opinion should be thought to go too far in denying the liability of the county to an action, still, the case is an authority for holding that when a particular method of raising money for local public purposes is prescribed by statute, the party entitled to receive it has a right to the full and perfect execution of the power conferred, which may be enforced by the writ of mandamus."

But it is further objected (and this objection goes to the merits of the application), that the certificate given by the superintending engineer, and for the one-half of which the comptroller of the city drew his warrant, includes items not properly chargeable under the act of 1872, to the cost of the improvement. If this objection be well taken, the amount of the illegal charges embraced in the certificate is of no consequence, and hence the application for a reference to ascertain the exact amount of such improper charges was refused. The certificate could only include such items as the law aforesaid authorized, and if it was made up in part of sums unauthorized, the application for the writ would be refused if such amount was great or small. The items objected to are: 1st. The cost of maintaining temporary tracks to run the trains whilst the work progresses; 2d. The necessarily enhanced cost of doing the work whilst a portion of the avenue is occupied by operating the railroad; and to obviate which it
(504) is claimed that the trains should have been stopped at the Harlem river. 3d. The construction of two additional tracks to secure rapid transit; and, 4th. The ten per cent., which in the estimate of the entire cost of the improvement

is allowed for contingencies. In regard to the latter item, no part of it enters into the certificate for which the comptroller drew his warrant—that representing money actually expended. The appearance of this in the general estimate of the whole cost of the work made prior to the commencement of the undertaking was proper and usual, to apprise those interested of the possible amount of money required. It was placed where it was so that a sufficient sum might be raised to cover any expenditure which the proper performance of the work made necessary, and to make the fund, against which the certificates were thereafter to be given, adequate for their payment. As to the other items something further will be said.

To the second point—that the cost of the work is necessarily enhanced by the occupation of a portion of the avenue during its progress by the operation of the railroad thereon south of Harlem river, and which increased cost by reason thereof, is admitted—the act itself furnishes a sufficient answer, in plain terms. The second section authorizes the laying down of "such additional temporary tracks on the Fourth avenue above Forty-second street as may be necessary for the railroad business during the progress of the work. From this express permission the inference is irresistible that the work was to be carried on with the Fourth avenue occupied in part by the business of the railroad. The legislature evidently supposed, as we can readily conceive, that the city was vitally interested in the uninterrupted flow of its commerce through this as one of its great arteries, and that such uninterrupted flow was of more pecuniary consequence to it than the enhanced cost caused by its interruption. If allowed to judge of the soundness of this legislative opinion, we would cheerfully announce ours to be in accordance with theirs. But we are not, as the
(505) fundamental law of the state has wisely committed such considerations to the sound wisdom and practical sense of the legislative department of the government; and it would ill become the judicial branch to say that such discretion could be lodged anywhere with more propriety or more safety.

As to the other two objections—the cost of the temporary tracks and the two additional permanent tracks to secure rapid transit—we think that they are not well taken. The first five sections of the act designated the improvement to be made, and what may and should be done during its progress. Among these is the one which provides for doing the very things, to the imposition of one-half of the cost of which upon the city objection is made. It is impossible to separate these acts from the others which are directed to be performed. After the character, nature and extent of the work has been indicated in these five sections, the next (the sixth) creates the board of engineers, "to execute, direct and superintend the construc-

tion of said improvements," and then sections 7 and 8 prescribe the share of the cost of "the said improvement," which the city is to sustain, and direct how the money shall be raised and paid out to accomplish the object. No rule of construction would justify the limitation attempted upon the words, "the said improvement." All had been previously specified as a part thereof, or as proper to be done in connection therewith; and if the legislature had intended that the city should bear one-half the expense of only a part of the work previously authorized or directed, it would certainly have so declared, and not use an expression which must necessarily cover all.

Neither does this construction work so great injustice to the city as the learned counsel for the mayor argues. The legislature of the state (*The People agt. Kerr*, 27 N. Y., 188) had power to authorize the relator to occupy the Fourth avenue with its tracks, and prescribe the mode of occupation. The permission to run cars over it, drawn by steam power, had been expressly conferred in 1859. Whatever control the city
(506) had over its occupation by virtue of the contract with the company, was given to it by the law chartering the company. It was perfectly competent for the same body, under whose permissive authority the city acted, to deprive it of that power and deal directly with the relator. It did so by the act of 1859, which unconditionally conferred the right claimed by the railroad. Such permission was not, as the learned counsel for the mayor argued, subject to the restrictions imposed by other acts, under and by virtue of which the city had undertaken to control the corporation in the use of the avenue; but such restrictions existed only, as the act declares, "except as herein modified." The act having in prior parts made express provision for the laying down of tracks, and the running of cars thereon by steam, and that, too, with the consent of the city, as it expressly declares; such use, granted for a term of years in an unqualified manner, must be deemed to be at least one of the modifications referred to. When the act of 1872 was passed, the legislature had before it the situation and rights of both the city and the relator. The former was vitally interested in the success and maintenance of the latter. The iron rail and the steam horse, which linked it to the great country of which it was the commercial center, were as important and vital to its growth as any of its other avenues which its wealth and enlightened public spirit have constructed. The improvement of this avenue, so as to admit of its use by the public and the railroad together, and the apportionment of the cost thereof upon some just basis, were the problems to be solved. Much of the work to be done properly belonged to the city, and much to the railroad. A separation of the one from the other in its execution would enhance the cost of

it as a whole, even though the part properly belonging to each could be accurately designated. Under such circumstances the law was passed by which the work was to be prosecuted as a unit, under one plan and a single superintendence, while the cost was equally divided between the two. If a part
(507) of the whole can be selected and an argument based upon it to prove the city pays a part of something it ought not to bear, so, on the other hand, doubtless, the railroad company might argue, as to some other part, that it paid for something which benefited the city only. The truth is that the work so runs together that its separation is impossible; and since the propriety of its execution is conceded by all, the apportionment of its cost could only be made by the legislative power in the exercise of its best judgment. We think it has acted wisely, equitably and justly; but if it has not, neither this nor any other tribunal has power to correct its errors. The work, when completed, will certainly not benefit the railroad company only, but the city equally as much. The exact proportionate benefit which each will receive can never be accurately ascertained. It is enough to know that both will feel that the money expended has been judiciously employed, and a division made of its cost by a body empowered to decide that question.

Having endeavored to show that the remedy sought is an appropriate one, and that, if granted, the city will not pay anything unauthorized by the law of 1872, let us now examine the various objections founded upon our federal and state consitutions. It is claimed:

First. That it violates the clause of our national constitution, forbidding any state to pass a law impairing the obligations of any contract. It is argued that as the contract of January 6, 1832, between the city and the company, gave to the former the right to control the use of the avenue by the latter, the act of 1872, which takes from the city this power of control, substantially abrogates this agreement. To this we answer: First, whilst discussing the previous objections, it was shown that the contract was annulled with the consent of the city, by the law of 1859, which definitely conferred the right to use the avenue by the propulsion of cars, over the tracks constructed upon its surface, by steam. This grant was
(508) absolute, and absolved the company from its contract of 1832, which had therefore ceased to exist when the present statute was passed; second, assuming that the old contract of 1832 was in force when the present statute was passed, it was competent for the city, if the old agreement was thereby improperly nullified, to make its objections. It, as a natural person, can waive its right, and assent to a change or modification of its bargains. Like a natural person, it cannot fold its arms and make no objection when it ought to speak.

It saw the machinery of the law being put in operation by an estimate of the cost of the work filed in the office of its chief financial officer, and in all that was done before the work began, and in the conduct of the same to the present time, one of its own principal officers (the chief engineer of the board of public works) took a leading and active part. No objection or notice is given to the relator that the provisions of the law are not in good faith accepted; on the contrary, it is allowed to make a contract, on the faith of a supposed acquiescence by the city, involving millions—the tax imposed is levied, collected and paid into the city treasury—hundreds of thousands of dollars are paid by the city in ratification of the new agreement which the law embodies; and now, at this late day, this objection is made after every tax-payer and every officer of the city—not even excepting the mayor, who is now objecting—has expressly ratified and confirmed it. So far as it is possible for any being, natural or artificial, to waive any prior agreement, if one existed, the city of New York has done so, and the point now, for the first time taken, cannot prevail. But, third, the city has no rights under the contract of 1832, so far as the use of this avenue by the relator is concerned, which the state was constitutionally bound to respect. The city, as we have shown under a previous point (*People agt. Kerr*, 27 N. Y., 188), had control over the occupation by the railroad of the street by the force of a power conferred. The body which gave it the power could withdraw it and exercise
(509) it for itself. It has done so, and that takes no inherent or vested right from the city.

SECOND. It is said that it violates section 16 of article 3 of the constitution of this state, which declares: "No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in its title." The title of the act is "An act to improve and regulate the use of the Fourth avenue in the city of New York." The cases of *Brewster agt. City of Syracuse* (19 N. Y., 116), and of *Ferdinand agt. Mayor*, (50 N. Y., 504), cover this objection. In the latter case it is decided, "if the title of an act fairly and reasonably announces the subject, and that is a single one, and if the various parts thereof have respect or relate to that subject, the provisions of the constitution that no local or private bill shall embrace more than one subject, and that shall be expressed in the title (*state constitution, art.* 3, Sec. 16), is complied with. The degree of relationship of each provision is not essential if it legitimately tends to the accomplishment of the general purpose." And it was also in that case further held, "the general subject of local improvements includes not only the plan and construction

of contemplated work, but the means by which the work may be accomplished, the proceedings necessary to be adopted for assessing and paying the expenses, and the remedies to parties for redress of grievances arising out of their construction." Tested by these rules there is no difficulty. When this law was passed, the public and the railroad company were in the joint use of this avenue, and the act declared by its title its object to be to "improve and regulate" its use. No improvement could be made without cost to some one, and the reader of such title would naturally conclude that a tax would be levied somewhere to pay such cost; and as the use was principally confined to the two corporations, it could reasonably be conjectured where it would fall. And further, as the public and the railroad were both using the avenue, the
(510) portion of the title which indicated that its use was to be regulated would naturally direct attention to the body of the act to ascertain how it was thereafter to be used. Every section of the act relates to this single object, and the title could not be made any more specific without incumbering it with the details of the machinery devised for its execution, which the framers of the constitution did not contemplate, and did not intend.

THIRD. It is further argued that the law is in conflict with section 13, article 7, of the constitution, which declares: "Every law which imposes, continues or revives a tax shall distinctly state the tax, and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object."

If this objection is to prevail, what becomes of all the various statute laws authorizing city and village corporations throughout the entire state to make local improvements, appoint boards to assess and determine the cost, &c.? What of various others creating special commissioners to ascertain and assess debts and damages due third parties from counties, towns, &c., and then directing the levy and assessment thereof upon the locality which should pay? If the legislature can authorize a municipality to make an improvement, appoint commissioners to ascertain and distribute its cost among those which in their judgment should bear it, and in such proportions as they think proper—why can it not, instead of delegating such power to others, act directly, and determine that a certain improvement shall be made, establish a board to direct and control its execution, apportion its cost as it thinks proper, and provide for its payment? Is there any greater exercise of power in one case than in the other? If the power to do an act can be legally conferred, the body which can make the grant can exercise the right itself.

In *People agt. Mayor of Brooklyn* (4 N. Y. 420), by virtue of the power conferred in the charter of the city, Flushing
(511) avenue had been improved, and the cost of the improvement assessed in part upon certain parties supposed to be especially benefited, it was held this was a proper exercise of the taxing power. Will it be argued that, if an act of the legislature had directly ordered the same improvement, had created a board to plan and execute the work, and had declared in the law itself what proportion of the cost the whole city should pay and what part specific corporations and individuals should bear, that such act would not be equally valid with the one it did pass?

In *Town of Guilford agt. The Supervisors of Chenango County* (13 N. Y. 143), it was held that a law of the state appointing commissioners to ascertain the amount due from the town to certain parties, and directing the assessment of the amount awarded by the board of supervisors of the county upon the town, was a valid and constitutional enactment. That case, which, like the one we are considering, provided for the assessment of a tax, the amount of which was to be ascertained by the means specified therein, was certainly unconstitutional if the act of 1872 is, for the reason we are discussing.

Whatever plausibility the objection may have from the words of the section and article of the constitution upon which the same is predicated, and whatever apparent contradiction there may be between it and the case we have cited, are explained by the remarks of Denio, Ch. J., in *Darlington agt. Mayor, &c., of New York* (31 N. Y. 164; *see pages* 182, 183), who in commenting upon the same article of the constitution to which the learned counsel of the mayor has referred, says: "The article of which the section is a part relates to the state finances, and, taken together, it constitutes the financial system of the state, so far as concerns constitutional restraints. The affairs of cities and counties, so far as they are regulated by the constitution, are treated of in other provisions." And precisely this explanation disposes of *People agt. Board of*
(512) *Supervisors of Kings County* (52 N. Y. 556), in its applicability to the case before us. The court had then before it a law imposing a state tax for state purposes, and that law was, of course, amenable to the article of the constitution regulating that species of legislation. Its soundness is not questioned, but it does not sustain the point urged now.

FOURTH. The objection that the creation of the board of engineers to superintend this work is a violation of article 10, section 2, of the constitution, in relation to the appointment of certain officers, cannot prevail. If the point be well taken, then *The Town of Guilford agt. The Board of Supervisors of Chenango County* (13 N. Y. 143), before cited, was wrongly

determined. In that case the court of appeals had before it the constitutionality of a law appointing commissioners to determine the amount of a tax to be levied. So, also, if the position be sound, *Litchfield agt. Vernon* (41 N. Y. 123) and *People agt. Lawrence* (41 N. Y. 137), were wrongly decided. In these cases the constitutionality of an act creating a special board of commissioners to do certain things relating to the closing of the Atlantic street tunnel in the city of Brooklyn, and to assess the cost thereof, was affirmed.

It would not be difficult to answer the objection were it an original question; but such a discussion is neither profitable nor necessary in view of adjudged cases, which this court has no power to reverse.

FIFTH. Neither is the law obnoxious to the first article of the constitution, section 9, which provides: "The assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes." No "public moneys," in the sense in which the word "public" is used in that part of the organic law, are appropriated so as to make a two-thirds vote of the legislature necessary. The use of the words "public" and "local" in the same section forbids the thought that they are synonymous expressions, and the
(513) structure of the whole sentence is in opposition to the construction which attaches to each a similar meaning. It was very easy to say, if that was the thought intended, that "no tax shall be imposed for a local or private purpose upon the state or a locality, except by the vote of two-thirds of the members elected to each branch of the legislature." Instead of that, the expression indicates, as well as the requirement, that the assent of two-thirds of the members was necessary when the money belonging to the whole state was to be appropriated for the benefit of a part. This construction makes the provision reasonable and proper, and demonstrates that the "public moneys" referred to in the section are those belonging to the state, and that the clause of the constitution cited is no limitation upon the power of the legislature to assess or tax the cost of a local improvement upon a locality. Neither by the law is any "private property * * * * taken for any public use," so as to make article 1, section 6, of the constitution applicable. Taxation upon a locality for an improvement therein is the exercise of a different power—the taxing power—whilst the constitutional provision just cited refers to the taking of property by the right of eminent domain. This distinction, ever since the able and exhaustive opinion of Ruggles, *J.*, in *People agt. Mayor of Brooklyn* (4 N. Y., 419), wherein it is most clearly stated and explained, has been well recognized in this state, and repeatedly followed since.

SIXTH. The last objection urged is that "chapter 702 of the Laws of 1872 is also unconstitutional and void in so far as it imposes the payment of this money upon the city of New York for the benefit of the Harlem Railroad Company, as the compelling of such payment is beyond the scope and purview of the legislative power."

Assuming the truth of the statement contained in the point urged, that the tax is for "the benefit of the Harlem Railroad Company," the objection is still without force. There is no such limitation on the taxing power of the legislature. In
(514) *Town of Guilford agt. The Supervisors of Chenango County* (13 N. Y., 143) before cited in answer to an objection that the law imposing the tax was a mere gift to the parties in whose favor it was imposed, judge Denio said: "The legislature is not confined in its appropriation of the public money, or of the sums to be raised by taxation in favor of individuals to cases in which a legal demand exists against the state. It can thus recognize claims founded in equity and justice, in the largest sense of these terms, or in gratitude or charity." In *Litchfield agt. Vernon* (41 N. Y., 123), also before quoted, judge Grover (*page* 134), speaking of the previously cited case, says: "In that case it was held that the legislature had the power to impose a tax upon the inhabitants to pay a claim that had no legal validity, and that could in no way be enforced against the town. In other words, that it was in the power of the legislature to impose a tax upon a locality for any purpose deemed proper, and that its power, in this respect, is not restricted by the constitution of the state." The opinion of Mason, *J.*, in *People agt. Lawrence* (41 N. Y., 137, *see pages* 140, 141, 142), is to the same effect. The case of *People agt. Batcheller* (53 N. Y., 128) does not conflict with these views. It simply decides that a law requiring a town, without the consent of its inhabitants, to become a stockholder in a railroad company, is unconstitutional.

But the objection assumes a fact which is not true. The provisions are not for the benefit of the relator, exclusively. This we have heretofore endeavored to show in this opinion. The proper improvement and use of the avenue by both the city and the railroad, and to make the one consistent with the other, were the results to be obtained. What part of the work justly belonged to the city, and what to the relator, it was difficult to define with accuracy; and the work to be done by each was so interlaced, that it was deemed wise to direct its construction under a single plan. Perhaps, from parts of this work the railroad receives the larger benefit, and from others the city. The legislature in its wisdom has assessed the one-
(515) half part upon each. This power is nothing different from what is exercised in behalf of municipal corpora-

tions every day. A street is opened and graded through agricultural lands. In such a case the amount to be paid by the city or village, as a whole, is always considerable, and yet the objection was never made, or if made, has never prevailed, that it was unconstitutional to tax the entire municipality for work, a part of which, at least, benefited individuals only. Such owners are presumed to pay for that part which specially benefits them in the assessments, which they pay for such benefits over and above their share of the general tax, to which they also contribute. So in this case the legislature has determined that one-half the cost of the improvement, over and above its proportion of the tax levied upon the city, should be paid by the relator as its share of the peculiar benefits resulting therefrom. It is not for this court to say that this apportionment is unjust. To that body, as the supreme arbiter under our constitution, has the right to decide been committed, and with its decision this court has neither the power or inclination to interfere. Doubtless, in the exercise of these great powers they will often err, as any tribunal, which is but human, will; but no system of government has ever yet been devised, and none ever will be established, which shall, in any department, always do exact justice, and whose lawful powers, if stretched to their fullest extent, might not work injustice in particular cases. In the grant of power, much must be conceded to the discretion, good sense and integrity of the individual or body to whom it is granted; but the concession of that which is fairly given should never be witheld, because extreme cases can be supposed in which it might be exercised with danger to the public. Practically, it will generally be found that the danger is largely imaginative, and the injury claimed to be done scarcely perceptible.

Before closing this opinion, it may be well to advert to another view, applicable as much to each of the objections urged, as to the particular one in connection with which it has been hereinbefore stated.

(516) Statutes and constitutional rights existing in favor of a party, natural or artificial, may be waived. May not the act of 1872 be regarded as the embodiment of an agreement between the parties, to which all have assented—upon which all have acted—and the withdrawal of either from which cannot be permitted, because by its conduct it has induced the other to incur responsibilities which, it may fairly be assumed, would not have been incurred if the other had not assented? The relator accepted the law by making the contract for the work, which the act required it to make. The city, through its officers, accepted it, by no protest against its provisions; by allowing the chief engineer of its board of public works to become a member of the board of construction, which

directed the work and controlled the expenditure; by using its machinery for the collection of taxes, to assess, levy, collect and receive into the city treasury its one-half of the cost; by drawing warrants and paying over a million dollars thereon; and, through its citizens by the payment of the tax levied for the city's share of the cost. Thus, all parties have agreed,—the city through every officer and every tax-payer. No rule of law and no rule of honesty, should permit objections to prevail which have been so fully and explicitly waived.

As against the respondent, however, the strength of the point founded upon the acquiescence of the city in the law of 1872, has not yet been stated. Every tax-payer in the municipality has not only assented to the act, but actually executed it. As a law imposing a tax, if it may be so regarded, it has already spent its force by the assessment and collection thereof, and the obtainment of the money for this purpose only. Every tax-payer has actually paid his, her and its proportion of the amount which the city was to pay of the cost of this great improvement into the city treasury, and all, except that part which has been paid over in execution of the law, still remains therein pledged to this object. It cannot be used for any other purpose without a fraud upon the parties from whom it was collected, and who paid it that this work should
(517) not fail. When the mayor refuses to countersign this warrant as the law commands, he refuses, not in order to protect his constituency from money oppressively to be taken against their will, but to defeat their wishes, and to appropriate their means to some use other than that to which they have pledged and dedicated it. His action in so doing is not only contrary to the desire of the relator, but to that of the body of the people whom he professes to represent and whose voice he should obey. The citizens of New York have a right that their means shall be used for the very purpose to which they have applied them, and none of their officers should be allowed to refuse to execute the trust which tax-payers, under the law, have committed to their official hands, in the belief that the provisions of such trust would be faithfully executed.

The result of my examination is, that the peremptory mandamus asked for should issue.

Supreme Court—General Term.

FELICE TOCCI, Appellant, *against* THE MAYOR, ETC., OF THE CITY OF NEW York, the New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company, Respondents.	73 Hun, 46. November Term, 1893.

VAN BRUNT, *P. J.*—This action is brought by a tax-
(47) payer to restrain the city officials from paying to the railroad companies, defendants, certain moneys under the provisions of chapter 339 of the Laws of 1892, upon the ground that it imposes upon the city a contribution to the private railroad structure belonging to the defendant railroad companies, and is, therefore, unconstitutional. Upon the application for an injunction *pendente lite* affidavits were submitted upon both sides, and certain material facts controverted in those affidavits. In cases of this description it is much better practice where the right to a preliminary injunction has been denied, and there are disputed questions of fact, that the party should go to trial and settle the facts, and there determine the question as to the right to an injunction, rather than to attempt to procure a decision of the General Term upon a state of facts which may be entirely changed upon the trial, and unless a very clear case is made by facts which could not be found to be different upon the trial such an order should be affirmed.

In the case at bar upon an examination of the papers upon which this application was founded, and the answers thereto, it seems to us that there is no possible reason for our interference with the court below. The whole fallacy of the plaintiff's action is the assumption that the contribution of money by the mayor, aldermen and commonalty of the city of New York to the enterprise in question is a contribution to a private use. On the contrary, it would appear that it is a payment upon the part of the city for benefits and privileges received; and with the question as to whether the city has paid a high or low rate for what it has acquired we have nothing to do.

It appears that the defendants, railroad companies, were,
(48) prior to 1872, the owners of and operating on Fourth Avenue in the City of New York, steam railroads from Forty-fifth Street up to and across the Harlem river. In 1872 an act was passed giving the New York and Harlem Railroad Company a statutory grade between Forty-fifth Street and the Harlem river, an increased width of depressed roadway, and where the said roadway was to be in tunnel giving to the city and the people the full width of Fourth Avenue between Fifty-sixth and Ninety-sixth streets. Between Ninety-sixth street and

Harlem river, the railroad structure was to be upon a viaduct and in a cut inclosed by sidewalls with undercrossings between One Hundred and Second and One Hundred and Thirteenth streets inclusive, and over crossings from One Hundred and Nineteenth street to One Hundred and Twenty-ninth street inclusive. The said railroads crossed and were to cross the Harlem river slightly above highwater mark. By this act the railroad companies were given the exclusive use and occupation of said road, and persons were prohibited from entering or passing upon the same, or any portion thereof under a penalty. In 1890 an act of Congress was passed providing that the Secretary of War should cause the low bridges then crossing the Harlem river to be replaced by other bridges at the expense of the owners thereof *as soon as the necessary legislation*, if such legislation were necessary, should enable the change in grade to the approaches of said bridges to be made, the owners of said bridges to be allowed a reasonable time in which to complete the work necessary for such bridges, and said bridges to have a clear space between the under side thereof and the high water of spring tides of twenty-four feet.

To enable the railroad companies to comply with the act of Congress all that would have been necessary to be done, was to change the grade from One Hundred and Twenty-fifth street to the Harlem river, which would have been much less expensive to the companies than the plan hereinafter mentioned, provided for by the act of 1892. But had this method been adopted, no part of Park Avenue would have been returned to public use, and it would not have permitted the free and unobstructed passage of the intersecting streets from one side of the city to the other.

In 1892, in order to enable the said railroad companies to comply with the requirements of the act of Congress,
(49) the Legislature passed an act changing the grade of the road from One Hundred and Sixth street to and over the Harlem river to One Hundred and Forty-ninth street, making in the act various requirements in respect to the plans, specifications and estimates for said work, and to the method in which the work should be done. The act further provided that when the plans, specifications and estimates should be made and filed as therein required, the expense and cost of the improvement should be borne and paid by the defendant, the New York and Harlem Railroad Company, or its lessee, the New York Central and Hudson River Railroad Company, and the mayor, aldermen and commonalty of the city of New York, in equal proportions as the construction of the said improvement progressed. The act further provided that when and as often as it should appear by the certificate of the superintending engineer of the work of said improvement, duly

certified by a board provided to be appointed by said act, that the sum of $25,000 had been expended thereon by either of said railroad companies, specifying the portions and divisions of said improvement where the said expenditure had been made, the comptroller of the city of New York should draw his warrant, etc., for one-half of the same. The act further provided that in no event should the proportion of the cost of said improvement to be paid by the city of New York exceed the sum of $750,000, and that if the cost of said improvement should exceed the sum of $1,500,000, then the entire cost over and above such sum should be borne and paid for by said railroad companies. And, further, that said improvement structure and bridge should be exclusively for the uses and purposes of the railroad companies, and it should not be lawful for any person or persons other than a public officer in the execution of his duty as such, with his agents and assistants, to enter and pass upon or through the same, or any portion thereof, on foot or in any other way than in the proper cars of such corporation provided for such purpose, with the consent of such corporation, under the penalty of a fine, this provision being the same as that contained in the act of 1872.

It is urged upon the part of the appellant that the contribution imposed upon the city by the statute of one-half the cost of the structure from One Hundred and Sixth street to
(50) the river, declared to be exclusively for the uses and purposes of a private railroad company, is illegal and in violation of the Constitution. And our attention is called to the provision of the Constitution which, so far as it is applicable to the question now before the court is as follows:

"No * * * city * * * shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association, or corporation, * * * nor shall any such * * * city * * * be allowed to incur any indebtedness except for * * * city * * * purposes."

The argument of the counsel for the appellant is that the statute under consideration provides that the city shall contribute practically to two material works: *First*, the construction of a railroad structure, which is expressly stated to be exclusively for the use of the defendant company, that is, the New York and Harlem or the New York Central and Hudson River Railroad Company, and, *secondly*, the filling in, regulating and paving under that structure of some space and street crossings from One Hundred and Fifteenth street to One Hundred and Thirty-third street, and making the same part of the public avenue; and that if the second purpose is not within the prohibition of the Constitution, yet if it has been so inextricably mixed in the statute with the first purpose,

which is within such prohibition, that it is inseparable, and the entire provision is vitiated. It is further urged that in the case at bar, however, the purposes and objects are not so mixed as to defy judicial discrimination, either in principle or in fact, and, therefore, the unlawful can and must be set aside; for the provision, so far as it prescribes the contribution to the ostensible public work of filling in, regulating, etc., can be readily separated from the part imposing upon the city the payment of one-half the cost of the private railroad structure declared to be for the railroad's exclusive use and purpose.

We think, however, that in this statement of propositions the essential features of the improvement are lost sight of by the appellant. It is undoubtedly true that the expense attendant upon the opening, filling in, regulating and paving of Park avenue, released by the elevation of the defendant's railroad tracks, can be separated from the expense of building such elevated tracks. But this is by no means the whole of the improvement, nor is it the part of the improvement in
(51) which the city is most largely interested. These railroad companies were in exclusive occupation of a part of the public streets of the city of New York. It was deemed by the Legislature advantageous to the city of New York that such occupation should cease, and that these portions of the streets should be restored to public use, and that the interruption of communication between the two sides of the city should terminate; and they considered that the advantages to be derived from these changes and the others to be made by the railroad companies, which the Legislature had no power whatever to enforce upon said companies, were of sufficient importance to the city of New York to justify its payment of one-half of the expense of the improvement up to $750,000. It is entirely immaterial in the consideration of this question whether the railroad company owned the fee of the land which they occupied or not. For all practical purposes they were its absolute owners, and entitled to its absolute control and exclusive use for the purposes of their railroads. It was for the abandonment of these rights, and the expense of other constructions in their stead, that the city was authorized to make the payments provided for by the act.

The provision of the act, in regard to the payments to be made, that the certificate of the superintending engineer of the work of the improvement should specify the portions and divisions of said improvement where said expenditures had been made, was simply a method of determining as to how much money, under the provisions of the act, the city at any one time could be called upon to pay towards the improvement.

It was a matter of considerable moment to the city of New York as to whether unobstructed communication should be had

between the different sides of the city from One Hundred and Fifteenth Street to the Harlem River. The improvement was but one work. There were different things to be done in carrying out its design. But merely because a portion of the improvement required either the removal or the bringing upon the ground of earthy material, and another portion required the bringing upon the ground and the erection of iron structures, by no means segregated the parts of the improvement. They were, each and every of them, necessary parts of one design. The elevation of tracks and the improving of the street were parts of the same work; and it is to this (52) one work that the city contributes. Even though the claim that the city contributes to the private structure of the railroad were true, if in consideration of such contribution the railroad surrenders rights which it had to public streets and avenues, and the Legislature chose to permit the city to buy out such rights by contributing to the expenses incurred because of such surrender, we see no possible constitutional objection thereto. It is merely paying a consideration for substantial advantages supposed to be gained. And we have nothing to do with the question whether the Legislature directed the city to pay a high or low price for the privileges which it acquired, or made an improvident bargain thereof, if their value is of such a character that an absolute gift cannot be inferred.

Now, it is conceded by the argument upon the part of the appellant that the acquisition of the streets occupied by the railroad companies and the establishment of uninterrupted communication between the two sides of the city are matters of great value, but, it is contended, not of the value which the Legislature directed the city to pay. Into this inquiry we cannot enter.

It is further urged upon the part of the appellant that, while the act is substantially granting a new franchise and use to these railroads, it contains no provision for a conveyance by the roads to the city or even a quit-claim deed or release of anything they then owned. But this in no manner affects the question. It is undoubtedly true, as was so ably shown by the counsel for the appellant, that the use of the streets by the railroad company, being abandoned because of their right acquired for an elevated railroad, the land in the street formerly occupied by them naturally and legally reverted to the city for street purposes. The conditions remained the same whether there was a formal release or a release by operation of law. The railroad companies surrendered their rights and accepted a new franchise, and the Legislature authorized the city to pay them not to exceed a certain sum for so doing. As

already stated, we see no constitutional objection to such a provision under the circumstances disclosed in the case at bar.

The order should be affirmed, with costs.

Follett and Parker, *JJ.*, concurred.

Order affirmed, with costs.

COURT OF APPEALS.

EMILY TALBOT, Appellant,
v.
THE NEW YORK AND HARLEM RAILROAD COMPANY and THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondents.
} 151 N. Y., 155.

Argued October, 1896; decided December, 1896.

BARTLETT, *J.*

This action is brought to enjoin the defendant corpora-
(158) tions from maintaining or using the bridge over Fourth avenue on which Forty-eighth street crosses as a public highway and a certain protection wall adjacent to plaintiff's house in the same street; also to compel the removal of the bridge and wall.

In 1869 the plaintiff purchased a lot 250 feet west from Fourth avenue, on the north side of Forty-eighth street, and erected thereon a brown stone front house. Shortly after the erection of this house the New York and Harlem Railroad Company acquired title to all the land on the north side of Forty-eighth street, lying between plaintiff's premises and Fourth avenue; also a large amount of land on the south side of the street opposite the lot of plaintiff. On the 1st of April, 1873, the New York and Harlem Railroad Company leased to the New York Central and Hudson River Railroad Company its railroad, extending from Forty-second street along Fourth avenue to the Harlem River.

In 1872 the Legislature passed an act (Ch. 702) entitled "An act to improve and regulate the use of the Fourth avenue in the city of New York," for the purpose among others of rendering the same safe and convenient for persons crossing the same.

The act provided that the New York and Harlem Railroad Company should construct, at Forty-eighth street, a tunnel under the Fourth avenue for sidewalks and carriage ways, or a bridge over the same for a like purpose, and that the tunnel or bridge should be at least thirty-four feet wide. The act had for its general object the abolition of grade crossings to conserve the public safety, as it was contemplated to run trains from the Grand Central Station at Forty-second street to the Harlem River at a high rate of speed. It was a work

of public necessity, and involved a large expenditure, which was shared equally by the city of New York and the defendants.

The act appointed a board of engineersto execute, direct and superintend the construction of the improvements,
(159) to be called "The Board of Engineers of the Fourth Avenue Improvement."

This board was made up of five members, one of whom was the chief engineer of the board of public works of the city of New York for the time being, and another was the engineer of the New York and Harlem Railroad Company, and was authorized and directed to take entire charge and control of the work, and to prepare plans and specifications and an estimate of the expense, and file them in the office of the comptroller of the city of New York; they were also required to take an oath of office before a judge of a court of record and file it with the comptroller.

All these provisions were duly observed, and on the 30th of June, 1872, it was resolved by the board to authorize the construction of an iron bridge over the railroad tracks at Forty-eighth street. On the 25th of July, 1872, the board awarded a contract for this work to the Watson Manufacturing Company, in accordance with plans, etc., duly filed, and directed the New York and Harlem Railroad Company to execute the contract with that company. This was done, the bridge was constructed, and is the one complained of by the plaintiff. The bridge has approaches on its westerly side commencing opposite to the eastern boundary of plaintiff's premises and ascending upon the lines prepared by the board of engineers until they meet the iron structure spanning the avenue.

The bridge is thirty-four feet wide as the act requires, and is placed on the south side of the street, the latter being about sixty feet in width, thus leaving the north sidewalk and a strip of the surface roadway unoccupied by the new structure. In order to close this side of the street and prevent those traveling upon Forty-eighth street from injury in attempting to cross the railroad tracks at grade, and as a part of the official plan as filed, a wall of brick was constructed eight feet three inches high and about thirty-one feet long, beginning
(160) at the southeasterly corner of plaintiff's house, and extending over the discontinued portions of the sidewalk and roadway to the corner of the bridge structure.

The trial court found that the bridge had been used since its construction as a public highway both for carriages and foot passengers, and that its approaches have been kept paved and in order and the bridge lighted ever since by the corporation of New York. It is further found that the corporation defendants have not had the custody of, or maintained the

bridge or the wall, or used the bridge; that they have in several instances replaced bolts to prevent danger to passing trains, and repainted the iron work which had been disfigured by the smoke of the engines.

It is also found that the board of engineers were able and skillful men, and that the work was examined by them after completion and accepted as duly performed under the provisions of the act of 1872.

It was under this condition of affairs, and nearly twenty years after this work was begun, that the plaintiff instituted this suit, alleging she had suffered great damage by reason of the bridge and wall.

The trial court found that the effect of the wall was to prevent, to a certain extent, access of a carriage to the front steps of plaintiff's house, and that in the early morning it cast a slight shadow into the front basement room, but later in the day the reflection from the wall increased the light.

It was also found that the bridge itself did not injuriously affect the light, air or access to plaintiff's house; that the damage caused by the wall was inconsiderable, and that it could not be determined from the evidence given how much in money that damage had been, or how much resulted from the lawful occupation of its own land by the railroad company adjoining and opposite to the plaintiff's premises, and not forming a part of Forty-eighth street.

It is not necessary, however, to determine whether the court below properly disposed of the question of damages upon the evidence, as we are of opinion that the law, as applied
(161) to the admitted facts, imposes no liability on the defendants.

We have in this case a change of grade of one of the public streets of the city of New York, the fee of which was in the city, by command of the legislature, under the supervision of a board of engineers of its own creation.

The defendant company acted as the agent of the board, and conducted the work according to its plans and under its supervision and control. On the completion of the work and its acceptance by the board it has been maintained and used by the city of New York ever since as a part of its highway system.

These facts show that even if the plaintiff has suffered damage, and can compel removal of the wall and bridge, the defendants are not liable in damages, nor would a decree of removal against them be of any force or effect, as they are not in possession of the bridge, or maintaining or using the same.

We think, however, that the facts show no liability on the part of any one.

While it is a general rule that abutting owners upon city

streets, although not vested with the fee, are entitled to the use of the street for access and other purposes, of which they cannot be deprived without compensation, yet this right is subject to important exceptions. In the case of *Reining* v. *N. Y., L. & W. R. Co.* (128 N. Y., at page 165), Chief Judge ANDREWS, in a discussion of these exceptions as applied to a very different state of facts, said:

"The cases of change of grade furnish apposite illustrations. They proceed on the ground that individual interests in streets are subordinate to public interests, and that a lot owner, although he may have built upon and improved his property with a view to the existing and established grade of the street, and relying upon its continuance, has no legal redress for any injury to his property, however serious, caused by a change of grade, provided only that the change was made under lawful authority. This, it is held, is not a taking of the abutting owners' property, and the injury requires no compensation."

In the case at bar there is no closing of the street, nor
(162) is the plaintiff excluded therefrom within the principle of the *Story* case (90 N. Y. 122).

The abolition of the grade crossing was required for the public safety, and the wall shutting out the traveler from the north sidewalk and strip of roadway leading down to the railroad tracks was a necessary part of the work ordered by the legislature.

This wall stands upon the property of the defendants and the city.

The proposition that in this case there is no taking of private property for public use under the provisions of the Constitution and that the acts complained of are *damnum absque injuria*, has been frequently sustained by this court. (*Radcliffe's Executors* v. *Mayor, etc., of Brooklyn*, 4 N. Y. 195; *Bellinger* v. *N. Y. C. R.R. Co.*, 23 N. Y. 42; *Moyor* v. *N. Y. C. & H. R. R.R. Co.*, 88 N. Y. 351; *Uline* v. *N. Y. C. & H. R. R.R. Co.*, 101 N. Y. 98; *Atwater* v. *Trustees, etc.*, 124 N. Y. 602.)

The Supreme Court of the United States has also approved the rule. (*Smith* v. *Corporation of Washington*, 20 How. [U. S.] 135; *Transportation Company* v. *Chicago*, 99 U. S. 635, 641.)

The appellant discusses other questions which need not be considered in detail, as they have no direct bearing upon the main and controlling point in this case. The plaintiff's contention that the defendants unlawfully occupy that portion of Forty-eighth street which is barred off from public use by the bridge and wall is not relevant to this controversy; it is a question between the defendants and the city of New York if the latter's property rights have been invaded.

The bridge approach and wall were located by the state through its agents; and as to the strip of land shut off from public use, it was in no legal sense a closing of the street, but a necessary provision to turn the tide of travel upon the sidewalks and roadway over the bridge. There is no finding, as contended, that this wall during the last ten years, or
(163) for any other period of time, has been maintained by either of the defendants, but there is an express finding to the contrary.

It is not necessary to examine the question of the Statute of Limitations.

We agree with the learned court below that the plaintiff established no cause of action, and that the complaint was properly dismissed on the merits.

The judgment appealed from should be affirmed, with costs.

All concur.

Judgment affirmed.

Court of Appeals.

HANNAH CONABEER, Appellant,
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER Railroad Company and The New York and Harlem Railroad Company, Respondents.
} 156 N. Y., 474.

Argued June, 1898; decided October, 1898.

Appeal from a judgment of the late General Term of
(476) the Supreme Court in the first judicial department, entered January 26, 1895, affirming a judgment in favor of defendants entered upon a decision of the court dismissing the complaint on the merits on trial at Special Term.

This action was commenced on the twentieth of November, 1891, to obtain an injunction perpetually restraining the further operation of the defendants' railroad in Park avenue, formerly known as Fourth avenue, in the city of New York, opposite the premises of the plaintiff, and for damages to the rental value thereof.

In 1807, by chapter 115 of the laws of that year, three commissioners were appointed who were empowered to lay out streets and avenues upon the northern portion of Manhattan Island, which included the locality in question. On April first, 1811, they filed a map showing the streets and avenues as they now generally exist. Upon this map One Hundred and Fourth street was shown to be of the width of sixty feet, and Fourth avenue of the width of one hundred feet. That act also provided that the map, plans and surveys so made and filed should be final and conclusive as to the mayor, aldermen

and commonalty of the city of New York, the owners and occupants of lands within the boundaries of the streets, and in respect to all other persons whomsoever. For many years after the filing of this map these streets remained unopened and had no existence, except that which resulted from their being designated as such on the map.

In 1831, by a special act of the legislature (Ch. 263),
(477) the New York and Harlem Railroad Company was incorporated, with power to construct a railroad from any point on the north bounds of Twenty-third street to the Harlem river, between the east bounds of Third avenue and the west bounds of Eighth avenue, with the right to operate it by steam, or by any mechanical or other power that the company might choose to employ. By that act it was given the right to locate its railroad and to file a map thereof in the office of the register of New York, but it was not to be filed until it should have been submitted to, and approved by, the common council. It was then authorized to build its road, to take all lands and real estate necessary for its construction, and to receive or take all voluntary grants or donations of land to aid in the accomplishment of that work. The act likewise provided that lands thus taken, which were not donated, should, if the parties could agree, be purchased of the owners at a price agreed upon between them, and then provided for condemnation when an agreement could not be had. It declared that the corporation was authorized to construct such a railroad, to use single or double tracks, and that in case its railroad was located along any public street or avenue then laid out upon the map or plan of the city of New York, it should leave sufficient space in the street on each side of the railroad for a public highway for carriages and a sidewalk for foot passengers. It also provided that the corporation should not be deemed to be authorized to construct a railway across or along any of the streets thus designated, whether open or not, without the consent of the mayor and aldermen, who were authorized to grant permission to the corporation to construct its railroad across or along the streets or avenues of the city.

The provisions of this act were complied with by the New York and Harlem Railroad Company, and it located its route along the center line of Fourth avenue, from Twenty-third street to the Harlem river, and filed a map in the register's office, October 22, 1831, together with a resolution of the common council, approved by the mayor, authorizing the company to construct its road over Fourth avenue. It obtained
(478) the consent of the municipal authorities to the location of such road by an ordinance approved by the mayor December 22, 1831.

At that time the locality which included the premises in

question consisted of farm lands and salt meadows, known as a part of the "Harlem Flats," a portion of which was owned by one Margaret McGown. On the eighteenth of January, 1832, Mrs. McGown conveyed to the New York and Harlem Railroad Company and its successors a portion of the land owned by her, consisting of twenty-four feet of land running through the center of Fourth avenue between Ninety-seventh and One Hundredth and Sixth streets for and during the period it might remain an incorporated company, on which to construct its railroad, but for no other purpose, with the right to slope its embankments or excavations so much farther beyond the line of the premises granted as might be necessary to support its work, not, however, to extend beyond the width of the avenue, which was one hundred feet.

Some time anterior to 1835, the railroad company constructed along this portion of Fourth avenue a stone viaduct upon the land in question, upon which two tracks were laid. The only difference between the old viaduct and the one now complained of is that the width of the latter was increased sixteen feet on each side, and accommodated two additional tracks.

In 1835, the matter of widening Fourth avenue from one hundred to one hundred and forty feet was brought before the common council by a petition requesting that the avenue be thus widened. One, if not the chief, ground upon which this was asked was the existence of the railroad in the center of that avenue. Subsequently, and in 1837, the street was widened to one hundred and forty feet.

Fourth avenue was not opened until nearly twenty years after the construction of the defendants' road over this part of it. In the proceedings for opening that street, the city of New York assumed to acquire the title to the strip of land upon which the defendants' road was constructed, and for which a nominal award of one dollar was made for each
(479) of the lots across which it passed. No attempt was made by the city to acquire the easements secured by the railroad company under its deed from Mrs. McGown, either as to its right to build and maintain its road along the strip purchased of her, or to slope its embankments and excavations so far as necessary to support the work. The possession by the railroad company of the portion of the street thus occupied was not attempted to be disturbed by the city. When the street was opened in December, 1853, the railroad was upon a high viaduct along the center of the avenue, which was in the exclusive possession of the New York and Harlem Railroad Company. The portion so occupied has never been used as any part of the public street.

In 1872, by chapter 702 of the laws of that year, the legisla-

ture passed an act to improve and regulate the use of Fourth avenue in the city of New York. That act authorized and required the railroad company to regulate the grade of its railroad in Fourth avenue in a manner specified, and to construct such viaducts, bridges, excavations, tunnels and openings as were therein described. It provided that from Fifty-sixth to Ninety-sixth street the railroad should run through a covered way with openings therein, and thence continue upon the grade as it then existed to the center of One Hundred and Fifth street. It also authorized the railroad company, for the purpose fo facilitating rapid transit and accommodating local traffic, to lay two additional tracks on such avenue, and to make such landings and excavations therein as might be required for the tracks and the entrance and delivery of its passengers outside of the excavations and viaduct. It created a board of engineers to execute, direct and superintend the construction of such improvement, the expense thereof to be borne by the city and the railroad company in equal proportions. It forbade the municipal authorities of the city from obstructing the use of Fourth avenue for that purpose above Forty-second street, authorized the municipal corporation to pass such ordinances as might be requisite or necessary to facilitate the improvement, provided that the railway be exclusively for
(480) the uses and purposes of the railroad company, and that the legislature might at any time alter, amend or repeal that act.

This improvement was carried on and completed under the direction of a board of engineers appointed by the legislature for that purpose. The height of the old viaduct at One Hundred and Fourth street, opposite the premises now owned by the plaintiff, was unchanged. The improvement at that point consisted in taking down the old viaduct and erecting a new one of the same height, but fifty-six feet wide. It was completed in 1873, in which year the New York and Harlem Railroad Company leased to the New York Central and Hudson River Railroad Company its railway for four hundred and one years. Since that time the railroad as then constructed has been in the possession of and operated by the latter company as such lessee.

In 1887, fourteen years after the improvement directed by the statute of 1872 was completed, the plaintiff purchased her lot at the corner of Fourth avenue and One Hundred and Fourth street. It was a part of the premises owned by Mrs. McGown in 1832 when she deeded the land in Fourth avenue to the Harlem Railroad Company. Upon the plaintiff's lot there was at the time of her purchase, and still is, a three-story and basement brick and stone building used as a dwelling house. Since June, 1887, she has been the owner in

fee and in possession and occupancy of the premises thus purchased.

Since the lease to the New York Central and Hudson River Railroad Company it has maintained and operated the railroad upon such viaduct and runs thereon a large number of trains during the day and night drawn by locomotives, and in its operation steam, smoke, noxious and unpleasant gases, vapors, coal, soot, cinders, ashes and sparks have been and are frequently emitted from such locomotives which fall upon the plaintiff's premises; loud and disagreeable noises have been and are produced by its operation; the free, steady and natural passage of light is interrupted, and dark shadows and
(481) bright flashes of light are produced. The viaduct and railway structure are of a lasting and permanent nature, intended for continuous and permanent use, and the defendants intend to continue to maintain, use and operate a railroad thereon.

The viaduct is about forty feet from the building line upon Fourth avenue. Of this, twenty-five feet in width on each side are used as a roadway for teams, carriages and other vehicles, and fifteen feet as a sidewalk. The street-line is now forty-two feet from such viaduct, while before the widening of Fourth avenue the street line was only thirty-eight feet from the viaduct as first constructed.

Joseph Ullman for appellant.

Ira A. Place, Alexander S. Lyman and *Hamilton Harris* for respondents.

(482) MARTIN, *J.* It is obvious that when the deed by Mrs. McGown to the New York and Harlem Railroad Company was given, it was understood between the parties that its railroad was to be built upon an embankment or viaduct in Fourth avenue, as it expressly provided not only that the grantee should have twenty-four feet of land in the center of the avenue during its corporate existence upon which to construct its railroad, but it also conferred upon the company the right to slope its embankment to the full
(483) width of the street. It is equally apparent that the grantor intended to confer upon the railroad company the right to construct, maintain and operate a steam railroad upon the premises so conveyed, and to thereby release it from any damages to her adjoining property arising from the proper exercise of that right. Thus the property now owned by the plaintiff which adjoins Fourth avenue became burdened with the easements or right of the company to maintain and operate its railroad at that place, so that neither the owner, nor her grantee, could recover damages for any injury to the property arising from the contemplated use, and could in no

way interfere with the proper exercise of that right by the railroad company during its continuance.

The only injury or interference with the premises now owned by the plaintiff was found by the trial court to have been caused by acts and conditions which were necessarily and naturally incident to the operation of a steam railroad. The court expressly declined to find that those acts and conditions deprived the plaintiff of her property in the avenue, or of the easements appurtenant thereto, or to find that access to the premises, or the approach of light and air thereto, was obstructed otherwise than by acts and conditions which were incident to the operation of the defendants' railroad. It also declined to find that the construction and operation of the defendants' railroad had diminished the value of the plaintiff's premises.

An examination of the evidence contained in the record shows quite plainly that the trial court was justified in declining to find that the plaintiff's access, light and air were obstructed, except in the manner stated. Therefore, the question presented is whether, under the proof contained in the record, the plaintiff was entitled to restrain the defendants from operating their road upon the viaduct in front of her premises, upon the ground that it affected them in the manner in which the operation of a steam railroad thus located naturally and necessarily would.

It is to be remembered that Mrs. McGown was the common source of title to both the plaintiff's and the de-
(484) fendants' lands, and that prior to her transfer of the premises now owned by the plaintiff she had transferred to the Harlem Railroad Company the right to build, maintain and operate its road in the center of the avenue where it is now located, thereby imposing upon the remainder of her land the burden of the presence of a railroad at that place to be maintained and operated as such. When she granted that right, it was the understanding of the parties that the premises granted were to be thus used, and was upon her part an irrevocable grant to the New York and Harlem Railroad Company and its successors of the right to so use the avenue during the period of the incorporation of that company. It in effect released to it any consequential damages to her remaining property which might be occasioned by the annoyances or injuries resulting from the operation of the road.

When that right was granted, Fourth avenue was but one hundred feet in width, and the viaduct or embankment first constructed by the defendants was at most but thirty-eight feet from the exterior street line. Since that time the street

has been widened to one hundred and forty feet, so that the street line is now forty-two feet from the defendants' viaduct.

It is claimed by the plaintiff that, as the New York and Harlem Railroad Company used only twenty-six feet of the avenue for the construction of its first viaduct, it waived any right it possessed in the remainder of the street, and, consequently, was entitled to maintain its viaduct upon that portion of the street only. Where a right is obtained by prescription, the measure of the right is controlled by the extent of the use. But where, as in this case, there is an express grant, the fact that the grant to its fullest extent is not immediately used will not amount to an abandonment or waiver of the rights thus expressly granted. Where one acquires a title by deed, it will not be affected by non-user unless there is a loss of title in some of the ways recognized by law. Mere non-user, however long continued, does not create an abandonment. (*Welsh* v. *Taylor*, 134 N. Y. 450; *Haight* vs. (485) *Littlefield*, 147 N. Y. 338.) Therefore, as between the plaintiff's grantor and the defendants, it is quite evident that the latter may exercise all the rights conferred upon them by the deed of Mrs. McGown, unless there has been a loss of that right in some of the ways recognized by law. There is no proof of any such loss. That the plaintiff's remote grantor, Mrs. McGown, surrendered the easements in Fourth avenue appurtenant to her abutting property, so far as the same were affected by the erection and operation of this railroad, there is no doubt, and the plaintiff could acquire no greater rights than were possessed by her. This court has several times held that a release or abandonment of the easements of light, air and access which are appurtenant to property abutting upon a public street may be established by any evidence which clearly indicates an intention upon the part of an abutting owner to abandon the right, at least where it has been acted upon by the other party. That the deed from Mrs. McGown to the defendant effected such a release and abandonment is obvious. (*White* vs. *M. R. Co.*, 139 N. Y. 19; *Foote* v. *M. E. R. Co.*, 147 N. Y. 367; *Ward* vs. *M. E. R. Co.*, 152 N. Y. 39.)

Although, under the statute of 1807, the commissioners appointed made a map which included Fourth avenue, still, until the street was opened and the damages to the owners of the land paid, the title remained in the latter. By the Laws of 1831 the Harlem Railroad Company was vested with power to purchase and hold such real estate as was necessary for the purposes of its incorporation, and was authorized to build its road in the public streets or avenues laid out on the map of the city. That act also provided that sufficient space on each side of the railroad should be left for a public highway for carriages and for a sidewalk for foot travelers. These rights

were reserved and granted, subject to the approval of the mayor, aldermen and commonalty of the city, which was obtained. In 1832, in pursuance of the power thus conferred, the New York and Harlem Railroad Company pur-
(486) chased the right of way of Mrs. McGown, to which we have referred, and the road was constructed thereon. In 1835, with the consent of the legislature, the municipality widened this street and opened on each side of the defendants' railroad streets for teams and foot travelers as required by the statute to which we have adverted. When this street was opened, the municipality assumed to acquire the title of the New York and Harlem Railroad Company to the property which it owned in Fourth avenue, awarding it therefor the nominal sum of one dollar upon each lot. At that time, however, the municipal authorities and the legislature recognized the right of the railroad company to continue its road in the street and in no way disturbed its possession or the exercise of that right. It is claimed that by this proceeding the city became vested with the title to the property of the railroad company, and, hence, that the deed from Mrs. McGown to the New York and Harlem Railroad Company was abrogated and its effect wholly annulled. This contention cannot be maintained. If it be admitted that the naked title to the land passed to the city, it is still clear that the consent of Mrs. McGown to the construction and operation of this road did not pass with it. That grant was at least an irrevocable consent to the use of the land for a specific purpose, which continued and remained in the corporation to which it was made. But if, as claimed, it passed to the city, so that the city had the right formerly possessed by the railroad company, then it is equally clear that the right still exists, and as the city has consented to the use of the street, Mrs. McGown and her subsequent grantee are yet bound by that grant. When the street was opened in 1853, the railroad was upon a high viaduct along the center of the avenue which was in the sole and exclusive possession of the railroad, and no portion of it was occupied as a public street. Therefore, whatever rights the city may have acquired, it is quite evident that, so far as Mrs. McGown was concerned, the right which she had granted to the railroad company never revested in her, and, consequently, neither she nor her grantees can assert the right thus released.

In 1872 the legislature passed an act adopting a plan
(487) for the improvement of Fourth avenue. By that act the railroad corporation was authorized and required to regulate the grade of its road, and authorized to lay two additional tracks for the accommodation of traffic and to facilitate rapid transit in the city. By the same act the officers

of the municipality were forbidden to obstruct the improvement or the use of Fourth avenue for that purpose. Therefore, not only the municipality consented to the improvement made in pursuance of that statute, but the legislature expressly authorized the use of the avenue for that purpose and to the width of the present structure, so that, unless the plaintiff has some right in the street which is superior to that of the defendants and to the combined power of the legislature and municipalty, this action cannot be maintained.

It is manifest that the only injury the plaintiff has sustained resulted from the proper use and operation of the defendants' steam railway; and as the plaintiff's grantor expressly conveyed to the defendants the right to maintain and operate it there, the plaintiff cannot recover for any injuries arising from that cause. The defendants' use of the street for the purpose of building, maintaining and opening its railroad was a legal one. It was constructed and is maintained and operated under and by virtue of the grant by Mrs. McGown and the combined authority of the legislature and municipality. "The Legislature, by virtue of its general control over public streets and highways, has power to authorize structures in the streets which, without such authority and under the common law, would be held to be encroachments or obstructions, and this power it may delegate to the governing body of a municipal corporation." (*Wormser* v. *Brown*, 149 N. Y. 168, 171.) As the appropriation of this street by the defendant for the purpose of constructing and maintaining its road was legal, no merely consequential damage to the owner of an adjoining lot, having no title to the street, furnishes a ground of action against the defendant. (*Fobes* v. *R., W. & O. R. R. Co.*, 121 N. Y. 505, 518.) Where a railroad is built in a public street or
(488) highway with proper care and skill, after the public rights and private property, if any, in the highway or soil have been acquired, the railroad is not responsible for any damages to private property necessarily resulting from its construction and operation. (*Uline* v. *N. Y. C. & H. R. R. R. Co.*, 101 N. Y. 98; *Conklin* v. *N. Y., O. & W. R. R. Co.*, 102 N. Y. 112.)

The cases of *Reining* v. *N. Y., L. & W. R. R. Co.* (128 N. Y. 157) and *Egerer* v. *N. Y. C. & H. R. R. R. Co.* (130 N. Y. 108) in no way impair the doctrine of the *Uline* and *Conklin* cases. Nor are they applicable to the facts in this case. In those cases it was held that the authorities of a city have no right to substantially close a street for ordinary street uses against an abutting owner, and that before an established street can be closed against such owner he would be entitled to compensation. In the case at bar the street at the place where the defendants' railroad was constructed was never opened or used

as a public street of the city. The streets in Fourth avenue were, by the command of the statute, laid out upon either side of the railroad structure, and were the only streets ever actually opened in that avenue. So that the plaintiff never acquired or possessed any right to the use of Fourth avenue as a public street, except such as she now enjoys.

This case is clearly distinguishable from the elevated railroad cases upon which the plaintiff relies. In those cases there was no grant by the abutting owners of the right to use the street for the purposes for which it was used, and the appropriation of the street was held to be illegal, while here the use of the street was legalized by a grant from the plaintiff's grantor, as well as by the legislature and municipal authorities. We are of the opinion that the grant to the New York and Harlem Railroad Company by the plaintiff's grantor is a substantial bar to the plaintiff's claim in this action. It is no answer to this position that the city subsequently, for a nominal consideration, obtained by condemnation the naked fee to the twenty-four feet of land deeded by Mrs. McGown to the New York and Harlem Railroad Company. In whomsoever the
(489) mere naked title to the twenty-four feet may rest, it is obvious, from the record, that the right to maintain and operate the defendants' road, with the consent of the plaintiffs' grantor, was not intended to be affected, but to remain in the defendants as a protection to their right, so long as the road was operated in that avenue and the time mentioned in the grant had not expired.

Under these circumstances, we agree with the learned trial court that neither Mrs. McGown nor her grantees, immediate or remote, can properly ask a court of equity to enjoin the operation of the defendants' railroad, to which her assent was thus expressly given. In *American Bank Note Co.* v. *N. Y. E. R. R. Co.* (129 N. Y. 252) this court held that where a public use authorized by law takes no land of an individual, but merely affects him by his proximity, the necessary annoyances of that use furnish no basis for damage. It was there expressly decided that noise was not an injury for which damage might be recovered, and that in that class of cases the abutter could recover only the damages to his easements of light, air and access. In *Wormser* v. *Brown* (149 N. Y. 163) this court determined that an interference with the view from the plaintiffs' windows would not entitle them to relief by injunction, and that the granting or refusal of equitable relief by way of injunction depends to a great extent upon the particular facts in each case, and is largely discretionary with the court in which the action originated. *In People ex rel. N. Y. & H. R. R.* v. *Commissioners of Taxes* (101 N. Y. 322) the judgment of this court was to the effect that the tunnels, tracks, superstruc-

ture, substructures, stations, viaducts and masonry of the defendants situated upon this avenue were land, within the meaning of the statute in reference to property liable to taxation, and that the fact that the city was required to pay a portion of the expense of the construction of the viaduct in question did not divest it of the incidents of other property belonging to the railroad company, or give the city any title to it, especially in view of the fact that the city was forbidden to obstruct the improvement or the use of Fourth avenue above Forty-second street for that purpose. Under the circumstances of this
(490) case, it is manifest that the abutting owners who derived their title from Mrs. McGown subsequent to her grant to the New York and Harlem Railroad Company were not entitled to have that portion of the avenue upon which the defendants' viaduct stands opened as a part of the public street, but that the only streets for public use which existed in Fourth avenue, or to the use of which they were entitled, were streets forty-two feet in width upon each side of the viaduct occupied by the defendants.

The plaintiff, however, contends that the increase in width of the viaduct from twenty-six to fifty-six feet was an additional burden upon the plaintiff's land, and, therefore, to the extent of such increase, the acts of the legislature and municipal authorities were unauthorized and the defendants' use of the street was an invasion of her rights as an abutting owner. Inasmuch as the trial court has properly refused to find that the plaintiff's easements of light, air and access were invaded or impaired, except by such acts and conditions as were incident to the operation of a steam railroad, to which her grantor consented, we think there was no such added burden as would justify this court in holding as a matter of law that the trial court should have awarded her relief by injunction. While the additional traffic over the defendants' road, resulting from an increased population and an enlarged business, may have added to the number of trains passing the plaintiff's premises, still, as it does not appear that the same number of trains might not have passed and the same traffic might not have been conducted upon the two previously existing tracks, and have been equally annoying and burdensome to the plaintiff's property, and as the consent of Mrs. McGown was unlimited in that respect, it would be difficult to determine the extent of any such added injury, if it exists, or to hold that it was not within the intention of the parties and covered by her grant.

Moreover, when the plaintiff purchased her premises, the defendants' viaduct had existed for many years, had occupied the entire portion of the street where it now stands, and
(491) was used substantially as when this action was commenced. She purchased the premises with full knowl-

edge of its existence, of its purpose and use, and with constructive notice of the defendants' rights. With that knowledge, presumably, she made the purchase for a price which included all proper deductions from its value by reason of the presence of the defendants' railroad, and, hence, lost nothing by being deprived of any of her otherwise appurtenant easements.

Under these circumstances we are of the opinion that the learned trial court was justified in declining to award to the plaintiff the relief demanded, and that this court cannot hold as a matter of law that the discretion of the court below was improperly exercised.

We have examined the various exceptions of the plaintiff relating to the reception and rejection of evidence, to the findings of the court and to the refusal of the court to find as requested, without discovering any that would authorize a reversal of the judgment or that requires further discussion.

The judgment should be affirmed, with costs.

All concur, except PARKER, *Ch. J.*, not sitting.

Judgment affirmed.

Court of Appeals.

MARY J. LEWIS, Appellant and Respondent,
against
THE NEW YORK AND HARLEM RAILROAD, Company, *et al.*, Respondents and Appellants,
Impleaded with the NEW YORK, NEW Haven and Hartford Railroad Company, Defendant.
} 162 N. Y., 202.

Argued January, 1900; decided February, 1900.

(218) VANN, *J.*: The plaintiff claims that the trial court erred in refusing to allow her damages for the effect of the new structures, both temporary and permanent, without considering the effect of the old structure. The defendants claim that the court erred in awarding any damages, or giving any relief whatever, to the plaintiff, because, as against her, they had the right to erect any railroad structure in the street, of any height, within the lateral lines of the old embankment.

The defendants' appeal rests mainly upon the proposition that, by virtue of the Benson deed to the Harlem Com-
(219) pany, in 1832, and possession thereunder for more than twenty years under claim of title exclusive of any other right, the defendants acquired title to the land upon which the steel viaduct now stands. (Code Civ. Pro., Sec. 369; *Baker* v. *Oakwood*, 123 N. Y., 16.)

The situation, when the Harlem Company entered Fourth

avenue and took possession of the strip of twenty-four feet covered by the Benson deed, was as follows: The section had been mapped under the act of 1807, as well as by Benson, and Fourth avenue had been laid down on both maps as one of the streets of the city. Benson had conveyed the entire avenue to the city for street purposes, reserving certain rights, and after thus conveying to the city had assumed to convey said strip to the Harlem Company exclusively for railroad purposes, but the conveyance was effective only as to his reserved rights. After conveying to the city, but before conveying to the company, he had conveyed, by reference to said maps, certain abutting lands to the plaintiff's predecessor in title. The avenue was not opened or built upon, as such, but was a street on paper only. The state and city had given the Harlem road the right to enter the avenue and lay down tracks on said strip, subject to certain drastic conditions, which gave the city supreme control, and to which the company had expressly assented, and, finally, the city had authorized the company "to take possession of the ground owned by the" former and had ordered the latter to construct its road thereon, with leave to use the street for "the purpose of a railroad and for that purpose only." The situation differs from that considered by us in a late case, as Benson had conveyed the street to the city and the abutting land to plaintiff's predecessor before he conveyed to the company, whereas in that case the first conveyance was to the company itself. (*Conabeer* v. *N. Y. C. & H. R. R.R. Co.*, 156 N. Y., 474.)

There is no evidence as to the character of the original entry into the street by the Harlem Company, or the nature of
(220) its claim when or after entering, except as it may be inferred from the facts above mentioned and the subsequent occupation and use for railroad purposes of a portion of the avenue, which was a street *in posse* only and did not become a street *in esse* until twenty years later. Under these circumstances the entry and occupation by the company must be "deemed to have been under and in subordination to the legal title" of the city. (Code Civ. Pro., Sec. 368; Code Pro., Sec. 81; 2 R. S., 293, Sec. 8.) Occupation must not only be hostile in its inception, but it must continue hostile, and at all times, during the required period of twenty years, challenge the right of the true owner in order to found title by adverse possession upon it. The entry must be strictly adverse to the title of the rightful owner, for if the first possession is by permission it is presumed to so continue until the contrary appears. If the occupation begins with recognition of the real owner's estate it is presumed to be subservient, and that the one making the entry intends to hold honestly and not tortiously. The character of the possession depends on the in-

tention with which entry is made and occupation continued. There is no *disseisin* until there is occupation with intention to claim title, and the fact of entry and the *quo animo* fix the character of the possession. The burden of proving all the facts necessary to constitute adverse possession is upon the one who asserts it, for in the absence of such proof possession is presumed to be in subordination to the true title. (*Brandt* v. *Ogden*, 1 Johns., 156; *Smith* v. *Burtis*, 6 Johns., 197; *Jackson* v. *Johnson*, 5 Cow., 74; *Jackson* v. *Brink*, 5 Cow., 483; *La Frombois* v. *Jackson*, 8 Cow., 589; *Humbert* v. *Rector, etc., of Trinity Church*, 24 Wend., 587; *St. Vincent Female Orphan Asylum* v. *City of Troy*, 76 N. Y. 108; *Doherty* v. *Matsell*, 119 N. Y., 646; *Kneller* v. *Lang*, 137 N. Y., 589; *DeLancey* v. *Piepgras*, 138 N. Y., 26; *Heller* v. *Cohen*, 154 N. Y., 299, 311; Tyler on Ejectment, 860; Buswell's Lim. & Ad. Poss., 380; Am. & Eng. Encyc. of Law (2nd ed.), 778.)

The entry by the Harlem Company was by the express permission of the city, under a resolution which recited that
(221) the land entered upon was at the time owned by the city. The occupation was permissive from the outset, and as there is no adequate evidence to the contrary, is presumed to have so continued ever since. The company recognized the title of the city by assenting to resolutions passed by the common council both before and after it accepted the deed from Benson. There was no open or notorious assertion of title under that deed, and no evidence of intention to claim title thereunder, except the deed itself, which was not recorded until after the railroad was built. There is no evidence that the city had notice, either actual or constructive, of that deed until the condemnation proceedings of 1850, when a nominal award was made to the company for its interest in the fee of the street. By an agreement duly executed under its seal, the company expressly covenanted that if permitted to occupy Fourth avenue, it would remove its railroad from the street wherever the city required it. It entered under a licence and remained under a license. Its unbroken continuity of possession from that day to this has never been accompanied with the assertion of any claim hostile to the city, for its deed from Benson, under the circumstances, is no evidence of a hostile claim, but simply that it had acquired Benson's reserved rights, which cut no figure in this controversy. Possession to be effective must be hostile to the rightful owner, and if the company intended to base a claim upon a deed in hostility to the city, the circumstances required it to make the fact known to the city, as otherwise its possession is presumed to be in accordance with its agreement. (*Treadwell* v. *Inslee*, 120 N. Y., 458). The city did not

know that the company had repudiated its agreement and stood on the Benson deed, exclusive of any other right, if such were the fact. It did not know of the existence of that deed, for the record was no notice, as a land owner is not compelled by the Recording Act to watch the records for conveyances of his own property. To authorize the presumption of a grant, the enjoyment "must not only be uninterrupted for the
(222) period of twenty years, but it must be adverse, not by leave or favor, but under a claim or assertion of right, and it must be with the knowledge and acquiescence of the owner." *Flora* v. *Carbean*, 38 N. Y., 111; *Bedlow* v. *N. Y. F. Dry Dock Co.*, 112 N. Y., 263; *Parker* v. *Foote*, 19 Wend., 313). When the occupant is in possession under two instruments, one subservient and the other hostile to the true owner, such possession, in the absence of positive notice to the contrary, will be regarded as subservient only, for the law raises a presumption in favor of an honest and against a dishonest purpose. This disposes of the appeal brought by the defendant, so far as it requires discussion apart from the claim of the plaintiff.

The plaintiff's appeal rests upon the proposition that she is entitled to the same relief that she would have been if there had been no railroad structure in the street prior to the erection of the steel viaduct. It would be sufficient to say in answer to this claim that as she asks aid from a court of equity, she can enforce her claim only so far as it is equitable, in the sense of being just. When she crosses the line of equity and good conscience to ask for compensation on the same basis as if Park avenue had never been a railroad street and seeks to recover damages which she has not suffered, on the ground of an alleged technical right, she must withdraw from a court of equity and seek relief at law. Since she or her predecessors submitted without complaint or question to the erection of two railroad structures in front of her property, each of which stood there for more than twenty years and wholly occupied the central portion of the street to the exclusion of all traffic therefrom, it would not be just to claim the same damages for injury to her easements by the third structure that she could properly have claimed if those easements had not been impaired by the previous structures. She has been awarded all that is equitably her due, which is the net difference, measured in money, between the effect of the old and the new structure while in actual use, less the benefits conferred by the latter. She has also been granted an injunction to protect her hereafter, unless her permanent damages are paid
(223) upon the same basis. A court of equity will give her no further relief.

But we will not stop here, for we wish to place our decision

upon grounds equally tenable in either jurisdiction. While the defendants acquired no right by adverse possession, as against the city, they acquired certain rights by prescription as against the abutting owner.

The leading facts bearing upon the subject may be summarized as follows: The lands embraced within the lines of Fourth avenue, as originally laid out upon the maps of the city and of Benson, were, by various conveyances, resolutions of the common council and acts of the legislature, so devoted to street purposes that they could not lawfully be used for any inconsistent purpose. (*Matter of Vil. of Olean* v. *Steyner*, 135 N. Y., 341, 345; *Lord* v. *Atkins*, 138 N. Y., 184, 191; *Haight* v. *Littlefield*, 147 N. Y., 338, 342.) The easements of light, air and access, so far as they had any practical existence prior to 1853 when the avenue was opened, were encroached upon by the first railroad structure, which, in front of plaintiff's premises, was a solid embankment 28 feet wide at the bottom and 10 or 12 feet high, walled in with stone. From 1853 until 1873, when the first improvement required by statute was made, the avenue was open and used as a street on either side of the railroad structure in the center, which continued to encroach upon the easements of the abutting owners. From 1873, when the embankment was converted into a viaduct 56 feet wide and 7 feet high in front of the *locus in quo* until 1894, when the last improvement required by statute was begun, the same encroachment continued. As to the plaintiff and her grantors there was an open, continuous and exclusive possession and enjoyment by the railroad company of the easements in question to the extent of the user during the periods named.

Prescription rests upon the presumption of a lost deed, after adverse use and enjoyment for twenty years, which has been adopted by the courts as the prescriptive period from analogy to the Statute of Limitations. (*Woodruff v. Paddock*, (224) 130 N. Y. 618, 624; *Snell v. Levitt*, 110 N. Y. 595; *Nicholls v. Wentworth*, 100 N. Y. 455; *Ward v. Warren*, 82 N. Y. 265; *Parker v. Foote*, 19 Wend. 309, 312; Goddard on Easements, 90; Washburn on Easements [4th ed.] 123; 19 Am. & Eng. Encyc. of Law, 7; Jones on Easements, Sec. 160; Gerard on Titles, 745.) What the primary owner loses by his *laches* the other party gains by continued possession without question of his right. (*Campbell v. Holt*, 115 U. S. 620, 623.) The adverse use must be of the same character and duration as the adverse possession required to give title to real estate, which has already been considered. If the presumption as to a lost deed may be rebutted, still it presents a question of fact which, in this case, has been determined in favor of the defendants. The possession of the defendants was not subordinate to the plaintiff's title, nor permissive as

to her, but openly hostile and necessarily known to be such, to her and her grantors, who made no objection until 1897. It was exclusive, definite and uninterrupted, for it absolutely excluded all from the part of the avenue occupied by the railroad structures. The obstruction was not out of view or knowledge, but in plain sight of the abutting owners, who, by making no objection, acquiesced in the situation. The question does not arise between the railroads and the city, which had consented in advance to the occupation, but between the railroads and the abutting owners, who had not so consented.

Under these circumstances the old structures had stood in the street so long that the railroads acquired a prescriptive right to have them stand there forever, so far as the plaintiff is concerned. The situation was the same in effect as if one of her grantors, while he owned her property, had conveyed to the defendants the right to permanently keep the stone viaduct where it stood and to use it indefinitely for railroad purposes. To the extent of the user by the companies the plaintiff, through the acquiescence of herself and her grantors, had parted with her rights when the present structure was erected. She could claim no damages on account of the old structure, so long as it stood there. She could claim
(225) no damages on account of any new structure erected in the same place, within the same lines, and for the same purpose, which inflicted no more injury upon her property than the old. She could raise no question except such as she could have raised had she given a deed expressly assenting to the erection of the old structure. (*Conabeer Case, supra.*) Had the new structure been no higher than the old, in front of her property, none of her rights would have been invaded, and she would have been entitled to no relief. These views are not inconsistent with but are in accordance with the principles of a case relied upon by the plaintiff, where the defense of prescriptive right failed because the facts failed, as adverse user was not found to have existed for the requisite period. (*American Bank Note Co. v. N. Y. El. R. R. Co.*, 129 N. Y. 252.)

The reason why possession of the same structure was adverse to the plaintiff but not to the city, is that the former never consented to the occupation, except by acquiescence during the prescriptive period, while the latter consented to the occupation in advance, and renewed the consent by subsequent acts at frequent intervals, while the railroad company never gave notice, direct or indirect, that it claimed to occupy under its deed or otherwise than by the consent of the true owner.

Prescriptive rights, however, are measured by the user, and the defendants could make no further encroachment without liability. (*Prentice v. Geiger*, 74 N. Y. 341; *Baldwin v.*

Calkins, 10 Wend. 169; *Bealey v. Shaw*, 6 East, 208; *Stiles v. Hooker*, 7 Cow. 266.) As was said by Judge Andrews in *Prentice v. Geiger* (*supra*): "The right is supposed to have had its origin in a grant, and the grant being lost, the user is the only evidence of the right granted, and as the presumption of a grant only exists where there has been an adverse, continuous and uninterrupted user, according to the nature of the easement claimed, for the period of twenty years, the prescriptive right is confined to the right as exercised for that period of time." The plaintiff, therefore, was entitled
(226) to recover for the additional injury to her property so far as it was caused by the defendants.

We now reach the question whether the defendants were liable for any part of the damages caused by the effect of the steel viaduct while it was in process of construction.

That structure was not erected by the defendants but by the state, as appears from the facts already stated. South of 125th street it gave them no facilities which they did not have before. The stone structure of 1872 did away with grade crossings and gave them four tracks, and this is all they have now. The change of grade north of 125th street, in order to cross the Harlem river at the height required by the general government, has no bearing upon the change of grade south of that point. The defendants are liable for what they did, but not for what the state did. (*Atwater v. Trustees, etc.*, 124 N. Y. 602.) The state created a board of experts and required them to make the improvement for the benefit of the public, giving them absolute control with no right on the part of the defendants to let or hinder. The board made the plans and did the work, letting their own contracts, employing and discharging their own men, without supervision or interference by the companies, which did not and could not set the board in motion, for the want of power, if for no other reason. The change of grade in front of the plaintiff's premises was not only for a public purpose, but was wholly in the interest of the public and not for the benefit of the defendants who had no power to prevent it. They simply paid one-half of the expense by command of the statute, and, hence, under compulsion of law. They are not liable for the acts of the Park avenue board, which was not their agent, but a governmental agency of the state. (*Benner v. Atlantic Dredging Co.*, 134 N. Y., 156, and cases cited on page 162.) Their offer in advance to obey the statute did not affect its compulsive force, for obedience was their duty. As was tersely said in a late case, the railroad company "had no choice left to it. The state intervened and directed that a work, which it had the power to require to be done, should be done, not by
(227) the railroad nor even by the city, but by an independent board in the creation of which the defendant

had no voice, over whose selection of employees it had no control, with the discharge of whose functions it could not interfere and whose operations it was powerless to prevent." (*N. Y., N. H. & H. R.R. v. Baker*, 98 Fed. Rep. 694.)

When the work was completed, if the defendants had not used it, they clearly would have been under no liability to the plaintiff. This is a decisive test, not only as to the permanent structure, but also as to the temporary trestles, which were part of the same scheme of the legislature, acting under general power, as well as that reserved when it incorporated the Harlem Company. They were erected by the same board, in the same way and under the same authority, but for the double purpose of aiding in the principal work of the state, and at the same time affording temporary relief to the defendants in the operation of their trains. The statute "authorized and directed" the defendants to operate their trains on the structures "when completed." Accordingly, they laid their tracks, at first on the trestle work, which they used for a short time, and then on the steel viaduct, which they have used ever since. In thus using the work of the state they doubtless accepted it as their own, but they accepted it as a completed structure, and did not thereby become parties to the process of construction. Their acceptance did not reach back and adopt the previous acts of the state, but the effect was the same as if they had purchased it from the state on the day they commenced to use it.

Thus we strike the time when the liability of the defendants began. When they commenced to use the steel viaduct they started a new trespass on the rights of the abutting owners. While they had a prescriptive right to use a railroad structure standing in the same place and of the same height as the stone viaduct, which was about 7 feet, they had no right, as against the plaintiff, to use the steel viaduct, which reached upward 35 feet until it was on a level with the windows of her fourth story. The new structure, so far as it stood within the
(228) lines of the old, was not a trespass, for it lessened instead of adding to the burden, but so far as it extended above the space which it had to occupy, it was a trespass, for which the defendants have properly been held liable during the time they used it. The trestle work, which stood wholly without the lines of the stone viaduct, was a trespass without mitigation, for it substantially closed the avenue and conferred no benefit whatever upon the adjacent property. As to that structure, the liability of the defendants was absolute during the period of user.

The permanent structure, however, was not an unmitigated trespass, for upon the surface of the street it was a great improvement upon the stone viaduct, which it displaced.

Before the change was made Park avenue was virtually two streets, each 42 feet wide, separated by a solid and impassable embankment 56 feet in width. Now it is 140 feet wide, with no obstruction to traffic except the columns which support the elevated roadbed. Never before could the plaintiff, or her predecessors, cross the street in front of her property, or even cross by the nearest lateral streets. For the first time in the history of the avenue its central portion is open, paved and capable of being used as a street. A substantial benefit was thus conferred, which, in assessing the damages inflicted upon the owner's easements, when no part of his land is taken, should in justice and according to authority be regarded. The basis of assessment is the difference in value of the easements as they now are and as they were with the old, and before the new viaduct was erected. (*Newman* v. *M. E. Ry. Co.*, 118 N. Y. 618, 624; *Bohn* v. *M. E. Ry. Co.*, 129 N. Y. 576, 591; *Sutro* v. *M. Ry. Co.*, 137 N. Y. 593; *Bischoff* v. *N. Y. El. R.R. Co.*, 138 N. Y. 257.) The courts below followed this rule and held the defendants liable for the net difference only.

The claim that the defendants abandoned their prescriptive rights by removing the old structure cannot be sustained. The old structure was not removed by the defendants, but by the state, of its own motion and through an independent (229) agency created by itself. Moreover, the removal of one railroad structure, followed immediately by the erection of another, in the same place and for the same purpose, is no evidence of an intent to abandon the prescriptive right to have a railroad structure in the street. If the new structure had not been a greater burden than the old the plaintiff would have been entitled to no relief whatever.

The effect of the condemnation proceedings of 1850, which widened the avenue, created no new easements for the benefit of the plaintiff or her predecessors, so far as the original width of the avenue was concerned. This was passed upon in the *Conabeer Case* (*supra*), and requires no discussion.

We have reached the conclusion that the learned trial judge awarded and withheld relief precisely as the law requires, and that his judgment should stand. In reaching this conclusion we have been materially aided by the opinions delivered in the Supreme Court in this and other cases affecting the locality in question, although we have not adopted all of the grounds upon which that learned court proceeded to judgment. (*Taylor* v. *N. Y. & H. R.R. Co.*, 27 App. Div. 190; *Welde* v. *N. Y. & H. R.R. Co.*, 28 App. Div. 379, and 29 Misc. Rep. 13; *Birrell* v. *N. Y. & H. R.R. Co.*, 41 App. Div. 506; *Sander* v. *N. Y. & H. R.R. Co.*, 42 App. Div. 618.)

We have decided the case before us and have not tried to

decide other cases, which, although arising in the same section, rest upon different facts, and may be controlled by different principles of law. While we have carefully read the argument presented by learned counsel in behalf of the intervenors, we have limited its effect, so far as we have followed it, to the facts of this case.

The judgment should be affirmed, but as both parties appealed, without costs to either as against the other.

Parker, *Ch. J.*, Bartlett, Martin, Cullen and Werner, *JJ.*, concur; Gray, *J.*, not sitting.

Judgment affirmed.

Court of Appeals.

CHARLES WELDE, Respondent
vs.
THE NEW YORK AND HARLEM RAILROAD COMPANY, *et al.*, Appellants, Impleaded with Others.

168 N. Y., 597.

Argued April, 1901; decided October, 1901.

O'BRIEN, *J.:*

(598) The plaintiff is the owner of real property abutting upon Park avenue in front of the railroad operated by the defendants. The Harlem railroad was incorporated in the year 1831, but not constructed until the year 1837. Since that time various changes have been made in its roadbed and structure as well as in the street through which it passes. The questions involved in this appeal are to be determined by the findings of the court which appear in the record and which do not appear to be assailed by either party. The case is presented to us upon these findings. and the only question that we are now concerned with is the proper legal conclusion to be drawn from the facts so found.

What is now Park avenue was laid out on a map as early as the year 1807 to the width of one hundred feet. Subsequently, under a statute passed in 1837, this map was amended and the street as thus laid out was widened so as to constitute an avenue one hundred and forty feet in width; but the street was not actually opened and laid out as such until after the year 1850. It was then opened to the public as a street and subjected to the control of the municipal authorities, and has ever since remained a public street one hundred and forty feet in width, at least from Thirty-fourth street to the Harlem river. The defendants' railroad is constructed and operated in this street, and has been for over sixty years. In January, 1832, one Isaac Adriance, the plaintiff's remote grantor, then

owned the land described in the complaint and the land comprising what is now the bed of Park avenue or the street in question. At that time he executed and delivered to the Har-
(599) lem Railroad Company a deed of a strip of land twenty-four feet in width in the center line of this avenue from the southerly side of One Hundred and Twenty-fourth street to One Hundred and Twenty-seventh street, "together with the power of sloping their embankments or excavations so much farther beyond the lines of said premises hereinbefore granted as may be necessary to support their works, not, however, extending beyond the width of the avenue." As the avenue was then one hundred feet wide, that was the utmost extent of the grant to the railroad, and it is conceded that whatever rights the defendants acquired under this grant may be asserted against the plaintiff, who has succeeded to the title of Adriance and is bound by any consent or conveyance by him for railroad purposes. It will be seen by the terms of this grant that the railroad was authorized, when necessary, to support the work, to place an embankment in the street to the width of one hundred feet at the bottom in order to procure a proper slope. It is also apparent that wherever it was necessary to make rock cuts or excavations through high ground, that the railroad was authorized to make excavations one hundred feet in width at the surface of the ground, or at least if that was necessary in order to give the proper slope to the excavation. The question arises as to the proper construction of this conveyance. It is obvious that the railroad and not the grantor was to be the proper judge to determine where excavations and embankments were necessary and the proper width and slope of the same within the limits of the one hundred feet. Whether the reasonable and practicable construction of this grant is that the railroad acquired thereby the consent of the property owner to the construction and maintenance of a railroad in the street as then laid out to the width of one hundred feet, or is limited to less than that by other considerations, is a question that would appear to be involved in the case, but may not be necessary to decide in view of the condition of the present record.

This action was commenced on the tenth day of October,
(600) 1895, and at that time, or at the time of the trial, the defendants' railroad was operated in Park avenue upon a steel viaduct structure eighty-two feet wide. It is a structure for four railroad tracks, supported upon five rows of columns, the outer rows of columns being placed substantially along the curb line of the avenue. Longitudinal plate girders were erected over the supporting columns so that the structure, or more properly speaking the columns, were about twelve feet and ten inches distant from the plaintiff's house line. The

main structure is entirely within the limits of the street as originally laid out to the width of one hundred feet, but as the girders extend beyond the main structure and are supported by columns at the curb line of the street, these columns or some of them are beyond the original street lines, but within the lines of the street as subsequently widened to one hundred and forty feet. Prior to the time that this structure was erected the railroad was operated in a rock cut at this point about sixty-two feet in width. The present structure was erected by a commission appointed by an act of the legislature, for the purpose of improving the street and enabling the public to use it to the full width by elevating the railroad *structure at a proper height* from the surface of the street. The statute which authorized this change in the operation of the railroad is chapter 339 of the Laws of 1892. It appears from the findings that this change was expressly directed by the statute and was the act of the state itself through this commission, the railroad company simply paying a portion of the expense in the form of an assessment. This was the situation, as disclosed by the findings, at the time of the commencement of this action. And an examination of the complaint shows that the action was commenced upon the theory that all these changes were made by the railroad company itself, whereas the trial court found that they were made by the commission under the statute, and that the railroad company could not be subjected to any liability in consequence of anything done by this commission. By chapter 594 of the Laws of 1896, the act of 1892, above referred to, was amended, and the defendants were required to erect and maintain a station at One Hundred and Twenty-fifth street upon a modified structure, the plans for which are particularly specified in the statute. The act directed the railroad to reduce the width
(601) of the main structure to eighty-two feet, as it now is. The structure erected by the commission was much wider. The reason for thus directing the structure to be narrowed was, doubtless, to furnish proper egress and ingress from the station to the trains. Whatever the purpose was, the railroad complied with the mandate of the statute and made the changes precisely in the manner therein specified, and this is the only act which, according to the findings, is to be attributed to the defendants. Since February 16th, 1897, the defendants' trains have been operated on this four-track viaduct structure, as they now are, and so far as appears that was the earliest date of the use of this structure by the defendants. The findings of the court, as they appear in the present record, naturally suggest the following questions:

(1) Did the Adriance deed, before referred to, operate as a consent by the plaintiff's predecessor in title to the mainte-

nance and operation of the railroad in front of his premises in this street covering a space not to exceed one hundred feet wide?

(2) Does the present viaduct structure, so far as it occupies this one hundred feet space, constitute any trespass or invasion of the plaintiff's property rights, and, if so, to what extent? (*Conabeer* v. *N. Y. C. & H. R. R. R. Co.*, 156 N. Y. 474.)

(3) In view of the grant from the plaintiff's predecessor in title, already referred to, and the acts of the legislature above mentioned, is this viaduct structure, upon which the railroad is operated, rightfully and lawfully in the street?

(4) This structure having been erected under the authority of the state itself, in a public street, in order to improve the street for public travel, can the plaintiff maintain an action to enjoin the operation of the railroad, or to recover damages against the defendants, in consequence of the existence of the structure, or its use by the defendants?

(5) The structure, including the changes made subsequent to the year 1896, having been erected in pursuance of the command of the legislature and in precise conformity with the plans and specifications indicated in the statute, has the plaintiff any right of action against the defendants to enjoin the operation of the railroad, or to recover damages, in so far as the structure exists within the original limits of the street, that is to say, within the one hundred feet? (*Hill* v. *Mayor, etc., of N. Y.*, 139 N. Y. 495; *Bohan* v. *Port Jervis Gas*
(602) *Light Co.*, 122 N. Y. 18; *Cogswell* v. *N. Y., N. H. & H. R. R. Co.*, 103 N. Y. 10; *Morton* v. *Mayor, etc., of N. Y.*, 140 N. Y. 212; *D., L. & W. R. R. Co.* v. *City of Buffalo*, 158 N. Y. 266, 478; *Hill* v. *Managers of Met. Asylum District*, L. R. [4 Q. B. Div.] 433; *S. C.* on appeal, 6 App. Cas. 193; *Trauman* v. *London, Brighton & S. C. R'way Co.*, L. R. [25 C. H. Div.] 423.

As we are of opinion that there must be a new trial of the case for the reasons which will be presently stated, and as it is possible that the findings may be changed, we do not deem it necessary nor timely to discuss these questions. The facts as they now appear in the record and in the findings of the trial court may possibly be modified hereafter, and, therefore, we leave these questions for consideration when they are necessary to a decision of the case. While the trial court found that this structure was erected by the commission in pursuance of the statute, it did not find expressly whether it was a lawful structure or not, or whether its construction or the operation of the railroad upon it was an invasion of any of the plaintiff's property rights. It is true that since it awarded rental and permanent damages to the plaintiff it might be that the learned trial court was of opinion that the

structure, or at least some part of it, was an invasion of the plaintiff's rights of property. The learned trial judge decided in substance that the railroad was entitled to occupy the street for railroad purposes to the width of sixty-one feet and eight inches, and this proposition seems to have been based on the fact that that was the width of the rock cut in which the train was operated prior to the changes herein indicated. It was not decided whether the defendant was entitled to the use of the street beyond these limits under the grant from the original owner. It may be inferred from the result of the decision that the learned trial judge was of the opinion that the present structure, in so far as it extends beyond the width of the original rock cut, is an unlawful structure and an encroachment upon the plaintiff's rights, although that is not expressly stated in the decision. The learned trial judge, however, found that from April, 1893, to the time of the
(603) trial, the plaintiff's premises had produced an income less by seventy-two hundred dollars than they would have produced if the improvements and changes in Park avenue and in the defendant's railroad structure, as required by chapter 339 of the Laws of 1892 and the amending acts, had not been made; that this loss of income had not been uniform, but had been greater during the years 1894, 1895 and 1896, when the work of erecting that part of the structure which was to be devoted to the station was done, and when the original structure was in part taken down and the modified structure erected and the second station finished and completed. Now all this work, except that of narrowing the structure under the act of 1896, was done, not by the defendants, but by the state through the commission already mentioned, and as we have seen the learned trial judge held that the defendants were not liable for any damage resulting from the action of that commission in erecting the structure. All that the defendants did was to narrow the structure and build a station in the street under the express direction of the legislature contained in the act of 1896. But it is quite apparent that since the learned trial judge awarded to the plaintiff just seventy-two hundred dollars as rental damages, he must have held the defendants liable for the act of the commission in changing the street and erecting the viaduct structure. Very few, if any, of the injurious acts alleged in the complaint have been found by the learned trial court, and such acts of the defendants, as appear in the findings, commanded and contained in the law of 1896, in the modification of the structure by diminishing its width, all occurred subsequent to the commencement of the action. But it may be that the course of the trial justified the court in finding the facts as they existed at the date of the trial, although all these

facts so far as they attributed any interference by the defendants with the plaintiff's light, air and access, occurred subsequent to the commencement of the action.

We think that the judgment must be reversed and a new trial ordered, with costs to abide the event.

PARKER, *Ch. J.*, MARTIN and LANDON, *JJ.*, concur; BARTLETT, VANN and CULLEN, *JJ.*, concur in result.

Judgment reversed, etc.

Court of Appeals.

GUSTAV R. FRIES, Respondent,
v.
THE NEW YORK AND HARLEM RAILROAD COMPANY, *et al.*, Appellants.

169 N. Y., 270.

Argued April, 1901; decided December, 1901.

O'BRIEN, *J.*:

The plaintiff is the owner of a three-story frame (273) building on Park avenue, at the southwest corner of 129th street, in the city of New York. The building contains eight stores fronting on the avenue. This avenue is one hundred and forty feet wide, and the defendants own and maintain a railroad therein, and have under some form and under some arrangement for over sixty years. The plaintiff claims that the railroad has invaded his property rights and is a trespasser upon them. For this trespass the trial court held that the defendants should pay to the plaintiff the sum of five thousand five hundred dollars, past and future damages, or, in default of such payment, be perpetually enjoined from operating the railroad. This appeal involves an inquiry into the principles upon which the judgment is founded. There is considerable discussion upon the briefs of counsel who have argued the case concerning the effect of a deed to the railroad by the former owner of the plaintiff's property and many other details relating to the right of the railroad to construct and maintain the same in the street in front of the premises in question.

I cannot perceive how these questions can be of (274) much consequence in the disposition of this appeal, since the trial court made an express finding that under this deed various resolutions and acts of the city authorities at various times and under certain statutes referred to, and by lapse of time and the acquiescence of the plaintiff and his predecessors in title, the defendants "acquired the right without liability to the plaintiff to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16th, 1897, as hereinbefore described." Here we have an express finding that on and prior to the date named

the defendants were entitled to have and maintain their railroad in the street in question as against the plaintiff and all the world, without let or hindrance from any one, and surely there could be no trespass upon the plaintiff's rights prior to that date. The trial court also found how the railroad had been maintained and operated on and prior to the date mentioned, as follows: "The said railroad prior to February 16th, 1897, was operated along the center of said Park Avenue in front of the plaintiff's premises in a depressed cut about fourteen feet below the surface of said Park Avenue and sixty-one feet and eight inches wide, which said railroad cut was bounded on each side by parapet walls of about two feet six inches above the surface of said avenue, which said embankment or viaduct cut off access from one side of said avenue to the other, except at the intersection of 128th and 129th street, at which points there were bridges for vehicles and foot passengers across the said railroad cut." According to this finding the defendants had the right to maintain a railroad in front of the plaintiff's premises that practically cut him off from access to the opposite side of the street except by means of bridges located at intersecting streets. The court also found that subsequent to the date mentioned the manner of operating the railroad was changed, and this is the finding on that subject: "That subsequent to the passage of Chapter 339 of the Laws of 1892, there was commenced within the lines of Park Avenue and in the center thereof the construction of a new viaduct of iron and steel, said structure being about twenty feet high above the surface of Park Avenue and about fifty-nine feet wide. Said work was done under the supervision of the Board
(275) for Park Avenue improvement above 106th street, and the said structure was completed and accepted by the defendants on February 16th, 1897. That neither of the defendants are liable for any fee or rental damage which may have been sustained prior to that date; that said permanent structure and the operation of trains thereon are, and since February 16th, 1897, have been a continuous trespass upon plaintiff's easement of light and air appurtenant to his said premises, and solely in consequence of said trespass and aside from any other causes the rental value of said premises was depreciated from said date down to April 2d, 1900, the date of trial, in the sum of $1,500."

It will be seen that the trial court held that the present viaduct and the operation of trains thereon, are, and since the date mentioned, have been, a continuous trespass upon plaintiff's easements of light and air appurtenant to his premises. It also found that this structure was built and the trains operated thereon under and in pursuance of the provisions of chapter 339 of the Laws of 1892. An examination of that

statute discloses very clearly a comprehensive scheme on the part of the state for the improvement of Park avenue as a public street by removing the railroad tracks from the cut, closing up the cut and then regulating, grading and paving the street. It was a legislative scheme for the accomplishment of a public improvement. The railroad company had nothing to do with it except to pay such assessment as was imposed upon it by the public authorities to defray the expense of the improvement. Whatever changes were made in the street and in the operation of the railroad were made not by the defendant but by the state in virtue of its general power to improve and regulate public streets. The defendant could not resist the improvement if it would, nor could it refuse when the viaduct was constructed to operate its trains upon it, even if it wanted to, without subjecting itself to a sentence of death at the hands of the state, as all corporations do that refuse to discharge the duties or perform the functions for which they have been created. There is no finding and no claim that the removal of the tracks from the depressed cut to the elevated viaduct was the act of the

(276) defendant. On reading the statute it will be seen that it was an act of the state, and how the defendant in one day became a trespasser upon the plaintiff's property rights it is very difficult to conceive. Another case growing out of this improvement was recently before this court (*Welde* v. *N. Y. & Harlem R. R. Co.*, 168 N. Y. 597), in which the effect of this statute was pointed out. If the viaduct was lawfully constructed and existed in the street under the authority of law, it is impossible to conceive how the defendant could be guilty of a trespass in the operation of its trains upon it. It was constructed for that purpose and the defendant was obliged to use it in the exercise of its franchise and the discharge of the duties due to the public.

The state resolved to displace the railroad in the depressed cut in order to fill up the cut, regulate, pave and grade the whole street, and to this end commanded the railroad to run its cars upon tracks placed upon a viaduct constructed by the state under the statute, and the railroad obeyed. If in doing so it became a trespasser, it must be because the legislation providing for the change violated some property right of the plaintiff which is protected by the Constitution. In other words, it must be because the statute under which the change was made is unconstitutional. I am unable to perceive any reason why the legislature had not the power to improve the avenue by removing the railroad from the cut to a viaduct, and if the change affected the rental or fee value of the property of an abutting owner having no title to the street, it was

but a consequence of the improvement for which the railroad was not responsible. The law is well settled in this state that where the property of an abutting owner is damaged, or even his easements interfered with in consequence of the work of an improvement in a public street conducted under a lawful authority, he is without remedy or redress, even though no provision for compensation is made in the statute. Whatever detriment the improvement may be to the abutter in such cases, it is held to be *damnum absque injuria*. (*Radcliff's Executors* v. *Mayor, etc., of Brooklyn*, (277) 4 N. Y. 195; *Talbot* v. *N. Y. & H. R. R. Co.*, 151 id. 155; *Folmsbee* v. *City of Amsterdam*, 142 id. 118; *Rauenstein* v. *N. Y., L. & W. Ry. Co.*, 136 id. 528; *Atwater* v. *Trustees, Vil., Canandaigua*, 124 id. 602; *Benner* v. *Atlantic Dredging Co.*, 134 id. 156.)

The change from the manner of operating the railroad in the depressed cut to an elevated viaduct was made in precise conformity to the mandate of an express statute, and hence even if the railroad made the change itself instead of the state, it would not be liable to the plaintiff. (*Hill* v. *Mayor, etc., of N. Y.*, 139 N. Y. 495; *Bohan* v. *Port Jervis G. L. Co.*, 122 N. Y. 18; *Cogswell* v. *N. Y., N. H. & H. R. R. Co.*, 103 id. 10; *Morton* v. *Mayor, etc., of N. Y.*, 140 id. 212; *D., L. & W. R. R. Co.* v. *City of Buffalo*, 158 id. 266; Id. 478; *Hill* v. *Managers of Met. Asylum Dis.*, L. R. [4 Q. B. Div.] 433; *S. C.* on appeal, 6 App. Cas. 193; *Truman* v. *London, B. & S. C. R'way Co.*, L. R. [25 Ch. Div.] 423.) The railroad originally covered nearly 62 feet of the street surface. Now the elevated structure covers only 59 feet above the surface. It would seem to be impossible to sustain the judgment in this case without assailing the constitutional validity of the statute under which this change was made, but I think it would be difficult, in view of the authorities cited, to state any ground upon which it can be questioned. But if this were otherwise it is clear that the plaintiff upon the present record is in no condition to raise any such question. He has not raised it in any form in any court, and it cannot be raised for him now as this court has recently held. (*Dodge* v. *Cornelius*, 168 N. Y. 242.) The plaintiff has not only refused to raise any question concerning the validity of the statute in this or any other court, but has actually affirmed its validity by setting it out in his complaint and basing his action upon it. So we have the case of a change in the grade of a street which necessitated a change in the location of the railroad tracks, all made under a valid statute, and that (278) alone is said to constitute the alleged trespass. The plaintiff's claim would seem to be answered by the principle laid down in the *Rauenstein* case, the other

cases first cited, and in *Ottenot* v. *N. Y., L. & W. Ry. Co.* (119 N. Y. 603.) The judgment in this case rests upon what may be called, for want of a better expression, a legal paradox. All that was done that in any way affects the plaintiff's property rights was done, not by the defendant, but by the state. The state engaged in the municipal duty of improving a street in which there was the right to maintain a railroad. It constructed a viaduct in order that the railroad might be operated upon it, and the railroad obeyed. This court has held that the railroad could not resist, which means, of course, that the legislation was valid. (*Lewis* v. *N. Y. & H. R. R. Co.*, 162 N. Y. 226.) On the 15th of February 1897, it is found that the defendant was rightfully and lawfully operating its railroad in this public street. The next day, as has been decided, it became a trespasser, not only in running trains upon the viaduct, but by maintaining it in the street. It would seem to follow from this that while the state had power to do everything that was done and to compel the railroad to be operated upon the viaduct, yet the railroad was guilty of a trespass in doing so; that is to say, the state compelled the railroad to commit a trespass and the railroad must be held liable for everything done by the state in the exercise of its supreme authority. The conclusion of the learned trial judge seems to me to involve this method of reasoning, and it would seem that a result which in its last analysis depends upon such arguments must necessarily be unsound.

The elevated railroad cases in this court proceed upon the principle that, as against abutting owners, the railroad was unlawfully in the street, as they had not consented to the construction or conveyed the right to interfere with their easements. But in the case at bar we have an express finding that the defendant had acquired the right as against the plaintiff to use the street for the operation of the railroad. Hence, the principles upon which that mass of litigation pro-
(279) ceeded have no application to this case, and so this court has held. (*Conabeer* v. *N. Y. C. & H. R. R. R. Co.*, 156 N. Y. 474.)

On reading the opinions in the court below, both at the trial and on appeal, it will be seen that no reason has been given for the judgment, except that it was supposed to be required by something decided by this court in *Lewis* v. *N. Y. & H. R. R. Co.* (162 N. Y., 202). I do not think that anything was presented, discussed or decided in that case that warrants the judgment in the case at bar. In the first case, the learned judge who gave the opinion in that case was careful to say at its conclusion: "We have decided the case before us, and have not tried to decide other cases, which, although arising in the same section, rest upon different facts and may be con-

trolled by different principles of law." This case does rest upon different facts, comes here in a very different way and is governed by different legal principles, and so is within the saving clause of the opinion. (1) In the first place the legal questions here mentioned were not presented, argued or discussed at all in that case. (2) In that case both parties appealed from a small judgment, and, hence, neither party was bound by the findings, except so far as there was evidence to support them. The evidence in support of the findings was, therefore, open for discussion here, and it will be seen from the report of the case that the discussion proceeded not so much upon the facts found as upon the proofs given, the decision below not being unanimous. The question of title in the railroad and of adverse possession were the principal matters discussed. Here we are relieved from all discussion of the evidence, since we have specific findings that the plaintiff does not question by appeal or otherwise, and that conclude the defendant as to the facts, and so we have a situation entirely different. (3) It was not found in that case that the railroad was lawfully in the street on the day that the present viaduct was completed, but only that it was lawfully in the street at an earlier date by three years. In the meantime it seems that it was shown in that case that the railroad was using an old viaduct constructed of stone, so far
(280) as it appears upon its own authority, while in this case no disturbing element of that kind intervenes, and hence we have to deal only with the single question whether the defendant was guilty of a trespass in the use of a viaduct constructed for that purpose by the State under a statute, and which the defendant was obliged to use, whether it would or not. These considerations mark a material distinction between the *Lewis* case and the one at bar. This case is not embarrassed by any such elements as existed in the case referred to. I have quoted the findings upon which this case comes here, and so long as these findings stand in the case, I am unable to see how there can be any recovery.

There are two other questions in the case of minor importance, but which merit a brief notice. The plaintiff became the owner of the premises in question in November, 1891. The second floor of the block was devoted to a dancing hall and the third or top floor to lodging rooms. In 1893 the plaintiff leased the dancing hall to a tenant with the use of the lodging rooms for a long term of years, and in 1896 he leased to the same tenant the corner store and basement. This tenant was in possession, paying the stipulated rent for the premises at the time of the commencement of this action. It will be seen by the findings of the court that the plaintiff

was allowed for the diminution in the rental value from February 16th, 1897. The damage to the rental value, if any, therefore, belonged to the tenant and not to the landlord as to that part of the property which was leased. The plaintiff, who was the landlord, lost nothing by the depreciation, because his rental was fixed long before the trespass began. It is only in those cases where the leasing takes place after the trespass or interference with the easements that the landlord is permitted to recover (*Kernochan* v. *N. Y. El. R. R. Co.*, 128 N. Y., 559; *Hine* v. *N. Y. El. R. R. Co.*, id., 571; *Kearney* v. *Met. El. Ry. Co.*, 129 id., 76; *Witmark* v. *N. Y. El. R. R. Co.*, 149 id., 393).

(281) It must be apparent that at least with respect to the plaintiff's easement of access, it must have been greatly improved by the removal of the railroad from the cut and the grading and paving of the street below the elevated structure. How the change interfered with his easements of light and air it is difficult to conjecture. But assuming that the findings of the court below in that respect are supported by some evidence, it is important to notice the line of proof given as to depreciation in rental and fee value. It appears from the record that the plaintiff called an expert who testified to the course of values in real estate on Madison and Lexington avenues, and was asked if there was anything which should induce the upward tendency in value in these avenues since 1892, which would have obtained in Park avenue had there been no change in the railroad. The questions in regard to the course of values on both these streets were objected to as incompetent. The objection was overruled and the defendants' counsel excepted. It will be seen that the witness was required to institute a comparison between property on Park avenue and on these other avenues for the purpose of proving damages. Park avenue was concededly subject to a servitude as of right for the use and operation of the railroad. Whatever effect that use or operation had upon the abutting property, the defendants cannot be made liable therefor. The other two avenues mentioned were not subject to any such servitude, and it was, I think, improper to give proof under which the court was required to institute a comparison of values between property on these two avenues which were situated so differently from that upon the avenue where the railroad was rightfully constructed and operated. It may be that in the elevated railroad cases proof of this character was admissible for the reason, as has already been pointed out, that in those cases there was no servitude upon the street as against the abutting owner. If, in the case at bar, the defendant had no right to be in the street as against the abutter, then

it may be that the proof would be admissible, but to compare the value of property on two avenues where there was no right to have or maintain a railroad, with property on
(282) another avenue where there was such a right, was improper and misleading.

The judgment should be reversed and a new trial granted, costs to abide the event.

MARTIN, J.:

Although there is a divergence of opinion among the members of the court as to some of the legal questions involved in this case, yet all agree that the statute (L. 1892, ch. 339) under which the acts complained of were performed is valid, and that the legislature did not transcend its powers in enacting it. It must also be admitted that all the acts of the defendants for which the plaintiff claims they are liable were performed under and in compliance with the direct and express mandate of that statute. That there was no encroachment upon or actual interference with the plaintiff's premises, and that the improvement was made for the benefit of the public and in a proper manner, are likewise practically conceded. Hence, the broad question presented is whether, in the absence of any statute providing for compensation, the defendants are liable for remote or consequential damages in having performed only such acts as were required by the express provisions of the statute upon works of a public nature, where there was neither negligence nor want of skill and no direct invasion of any private property of the plaintiff. We think not. In every civilized community controlled by governmental or municipal laws or regulations, there are many cases where the individual must be subjected to remote or consequential damages or loss to which he must submit without other compensation than the benefit he derives from the social compact. It is well settled by many decisions of this court that acts which are authorized by an express enactment of the legislature and performed in good faith upon a work of a public character, do not render the persons performing them liable for consequential damages unless there is an absence of due care or skill in the execution of the work. In other words, an act done under express authority of law for a public purpose, if done in a proper manner, and the property of the individual is not taken or encroached upon, will not subject the party doing it to an
(283) action for its consequences whatever they may be, unless the law itself provides compensation for injuries of that character. This is the rule where public works for the general welfare are constructed or operated.

Moreover, it seems to us that the principles of law relating to the change of the grade of streets, when lawfully made, are

applicable in this case. Here the defendants possessed the right to maintain their railroad and run their trains along and over the street. With their rights, as they then existed, they were content. The sovereign power of the state, however, interfered for a public purpose by a law which expressly and specifically required the grade upon which the railroad was run on this street to be changed, and caused to be erected a steel viaduct upon which the defendants were required to run their trains, so that every act of the defendants of which the plaintiff complains was required by express provision of law. Under these circumstances, it seems quite clear to us that the defendants, as they have not encroached upon the land of the plaintiff or in any way interfered with it, are not liable for any consequential damages the plaintiff may have sustained by reason of the defendants having obeyed the mandate of the statute These views find support in the following authorities: *Lansing* v. *Smith* (8 Cow. 146); *Radcliff's Executors* v. *Mayor, etc., of Brooklyn* (4 N. Y. 195); *Wynehamer* v. *People* (13 id. 378, 401); *Davis* v. *Mayor, etc., of N. Y.* (14 id. 506, 522); *Bellinger* v. *N. Y. C. R.R.* (23 id. 42); *Selden* v. *D. & H. C. Co.* (29 id. 634, 642); *Coster* v. *The Mayor, etc., of Albany* (43 id. 399, 415); *Brooklyn Park Comrs.* v. *Armstrong* (45 id. 234, 245); *Kellinger* v. *42nd St. & G. S. F. R.R. Co.* (50 id. 206); *Losee* v. *Buchanan* (51 id. 476, 480); *St. Peter* v. *Denison* (58 id. 416); *Clemence* v. *City of Auburn* (66 id. 334, 339); *Moore* v. *City of Albany* (98 id. 396, 407); *Uline* v. *N. Y. C. & H. R. R.R. Co.* (101 id. 98, 107); (284) *Conklin* v. *N. Y., O. & W. Ry. Co.* (102 id. 107); *Cogswell* v. *N. Y., N. H. & H. R. R. Co.* (103 id. 10); *Heiser* v. *Mayor, etc., of N. Y.* (104 id. 68, 72); *Bohan* v. *P. J. G. L. Co.* (122 id. 18, 26); *Atwater* v. *Trustees Vil. of Canandaigua* (124 id. 602, 608); *Reining* v. *N. Y., L. & W. Ry. Co.* (128 id. 157); *Egerer* v. *N. Y. C. & H. R.R. Co.* (130 id. 108); *Benner* v. *A. D. Co.* (134 id. 156); *H. R. T. Co.* v. *W. T. & Ry. Co.* (135 id. 393, 411); *Rauenstein* v. *N. Y., L. & W. Ry. Co.* (136 id. 528); *Hill* v. *Mayor, etc., of N. Y.* (139 id. 495, 501); *Folmsbee* v. *City of Amsterdam* (142 id. 118, 122); *Talbot* v. *N. Y. & H. R.R. Co.* (151 id. 155); *Sullivan* v. *Dunham* (161 id. 290, 298); *Huffmire* v. *City of Brooklyn* (162 id. 584, 589); *Uppington* v. *City of N. Y.* (165 id. 222, 228).

While in some of the cases cited the question here is not involved or decided, still, even in those cases the rule suggested has been recognized and admitted to be the existing law of this state.

Aside from the case of *Lewis* v. *N. Y. & H. R.R. Co.* (162 N. Y. 202) the only authorities upon which reliance is placed, to sustain a contrary doctrine, are the elevated railroad cases.

While those cases have created a liability theretofore unknown, which we think should not be extended, still, it seems to us, they are not only clearly distinguishable from a case like this, but should be distinguished on the merits. In those cases, if correctly understood, the only authority the elevated railroad company had to appropriate the street was the consent of the legislature and the municipal authorities. There, there was no law prescribing what they should do or that required them to do it. Here, we have a valid statute which expressly and specifically provides what shall be done as to the change of the grade in this street or the erection of a viaduct, provides the manner in which it shall be done, and appoints, or provides for the appointment of, commissioners to carry the statute into effect. It then directs that upon the completion of such viaduct, the defendants shall run their trains over it. Thus in one case we have a mere consent or permission by the public authorities, while in the other we have an express and mandatory statute requiring the defendants to do precisely what they did, and of which the plaintiff now complains. It seems to us that this distinction requires us to apply the
(285) general principle applicable to such a case and not the special law that has been created by the decisions in the elevated railroad cases.

While I agree generally with the views expressed by Judge O'Brien, I still think that the decision about to be made can be said to be in conflict with the *Lewis* case, and to such extent as it is, the *Lewis* case should be regarded as limited.

Cullen, *J.* (dissenting).

I dissent from the decision about to be made because I regard it as not only inconsistent with our recent decision in the case of *Lewis* against this defendant (162 N. Y. 202), but as opposed to the prevailing law of this state. Four propositions are settled law with us: 1. That the damage inflicted on an abutting owner by a change in the grade of a street does not constitute a taking of property within the meaning of the Constitution, and that the abutter is not entitled to compensation for such injury unless some statute awards it. (*Radcliff's Exrs.* v. *Mayor, etc., of Brooklyn*, 4 N. Y. 195; *Talbot* v. *N. Y. & Harlem R.R. Co.*, 151 id. 155.) 2. That the use of the surface of a street or highway for the purpose of a railroad does not invade any property right of an abutting owner who has no title to the soil of the street. (*Kellinger* v. *F. S. St. & G. S. F. R.R. Co.*, 50 N. Y. 206; *Forbes* v. *R. W. & O. R.R. Co.*, 121 id. 505.) 3. That an abutter has an easement in the street for the purposes of light, air and access; that the erection of an elevated structure for the purpose of carrying a railroad thereon is an invasion of such easement and an appro-

priation of the abutter's property rights, for which, under the Constitution, he must be compensated. (*Story* v. *N. Y. El. R.R. Co.*, 90 N. Y. 122. See all the elevated railroad cases since that decision.) 4. That while the public authorities may raise the grade of a street for street use, or may authorize the construction of a surface railroad on the street, in either case without liability to abutters, they cannot raise the
(286) grade of a street for the exclusive use of a railroad without compensating an abutter for the injury inflicted. (*Reining* v. *N. Y. L. & W. Ry. Co.*, 128 N. Y. 157.) The circumstances which distinguish a case which falls under one rule from one which falls under another rule are readily apprehended, and the rules are of comparatively easy application. Whether the difference in circumstance is such as to justify the distinction in principle which prevails in our state is quite another question. I admit that two rules of law, one of which declares that raising the grade of a street and the construction of a bank of solid filling opposite an abutter's premises is *damnum absque injuria*, and the other, which holds that the erection of an elevated railroad is an invasion of the property rights of an abutter which cannot be constitutionally effected without compensation, may seem somewhat inconsistent. But I intend not to be led into a discussion of that subject. It is sufficient to say that such is the settled law of the state, and that the rules which I have stated, consistent or not, exist in full force and integrity in our jurisprudence at this very time, and that on their authority we are deciding cases at almost every term of court. I may, however, remark in passing that if the attempt is to be made to harmonize the law on this subject, surely it should not be in the direction of extending the doctrine of *Radcliff's Exrs.* v. *Mayor, etc., of Brooklyn*. That case has been repudiated in many jurisdictions, and though firmly imbedded in the law of this state, the hardships occasioned by its application have been so great that in most cases legislative enactments have given abutters the right to compensation for their injuries. If while the legislature can authorize the laying of a surface railroad without compensation to the abutter, it cannot authorize the construction of a viaduct for an elevated railroad unless compensation be made to the abutter, it must be equally without power to transform a surface road into an elevated road without providing for such compensation. It necessarily follows that, notwithstanding the legislature might have authorized the grade of Fourth avenue to be raised to the height of the structure for the erection of which the plaintiff brings this action, without liability to abutters, that structure invades the plaintiff's property rights, an invasion for which he

is entitled to compensation. To relieve the defendant
(287) from liability for such compensation it must trace its right to maintain the viaduct as against the abutter, not to the act of the legislature alone, but to a grant of some private property easement to which the plaintiff's title is subordinate or to prescription, which is merely the presumption of such a grant.

It is said that the legislature had power to authorize the improvement of Fourth avenue and to direct the railroad company to elevate its tracks. This cannot be doubted. But it could not relieve either the commissioners or the railroad company from paying for any private property taken for the improvement. If I am right in the proposition repeatedly held by this court that an abutter has an easement of light, air and access in a street as against all structures therein except those to be used for strictly street purposes, and as against all improvements save a change in the grade of the street itself, then the situation in no way differs from that which would have been presented had the legislature turned the railroad company off the street altogether and made it construct a new line on adjoining property. In either case the railroad company would be bound to pay for what it took. These propositions were not discussed in the *Lewis* case, but were assumed as settled by the previous decisions of this court and that decision could not have stood on any other foundation. What here has been written, there passed without the saying. In the *Lewis* case the defendant was held not to be answerable in damages until it began running its trains over the structure. This ruling did not proceed on the theory that the construction of the viaduct worked no trespass on the plaintiff's rights, but on the ground that the defendant did not participate in that trespass until it went into possession of the structure and ran its trains thereon. There is no inconsistency between the *Lewis* case and that of *Conabeer* against this defendant (156 N. Y., 474). The same learned judge that wrote in the earlier case concurred in the opinion delivered in the later case. In
the *Conabeer* case the trial court found as a matter of
(288) fact that no injury to the plaintiff's easement was occasioned by the new structure. In the *Lewis* case and in the present one the findings of fact are the exact reverse.

It is said that the trial court has found the structure to be lawful and that such finding is binding upon us. The finding is merely one of law and properly construed it is correct. An obstruction in a highway that would otherwise constitute a nuisance may be authorized by the legislature; but, of course, the party creating it would have no right to maintain it as against the owner of the soil of the highway. Yet the main-

tenance of the obstruction would be properly characterized as lawful, that is to say, as having the authority of law and as not being a nuisance. It is further contended that for the plaintiff to succeed, the statute authorizing this improvement must be held unconstitutional and that as no question of its constitutionality was raised in the trial court none can be raised here. The statute is not unconstitutional and no decision to that effect is necessary to secure the plaintiff's rights. If an act were passed by the legislature authorizing a corporation to construct a bridge across the Hudson river above Waterford, it would be unconstitutional because the Constitution prohibits the enactment of a special law for such purpose. If, however, the act authorized the construction of a bridge at the Highlands (the Constitution permitting special acts for bridges over the Hudson river below Waterford) it would not be rendered unconstitutional by the fact that the company did not own a rood of ground in either of the counties which border on the river at that point. The statute would simply be inoperative until the company acquired the necessary land.

As this is a dissenting opinion, I do not deem it necessary to discuss the extent of the right acquired by the defendant through private grant. It is sufficient to say that it is not greater than that carefully examined and considered in the *Lewis* case, and that it is of the same general character. If my difference with the majority of the court related merely to that subject I should be content to confine myself
(289) to the record of my vote. It is against what I consider the broad and far-reaching doctrine of the prevailing opinion that I feel constrained to express the reasons for my dissent.

MARTIN, J., in memorandum concurs with O'BRIEN, J.; PARKER, Ch. J., and LANDON, J., concur with O'BRIEN and MARTIN, JJ.; BARTLETT and VANN, JJ., concur with CULLEN, J.

Judgment reversed, etc.

Court of Appeals.

HENRY MUHLKER, Respondent and Appellant,
v.
THE NEW YORK AND HARLEM RAILROAD COMPANY et al., Appellants and Respondents.
} 173 N. Y., 549.

Argued October, 1902; decided February, 1903.

PARKER, *Ch. J.:*

The facts in this case present the same question that was before this court in the *Lewis Case* (162 N. Y. 202)
(551) and the *Fries Case* (169 N. Y. 270) and that is, whether defendant is liable for any damages that may have

been sustained by plaintiff by reason of the interference with his easements of light, air and access by the erection of the viaduct upon which its trains are now being run.

Defendant was incorporated in 1831, and in 1832 it took from one Poillon a deed to a strip of land 24 feet wide in the center of what is now known as Fourth avenue, in the city of New York, along which the premises belonging to the plaintiff are situated. Subsequently double tracks were laid thereon and trains operated, and this continued until after 1872. In that year an act was passed (Ch. 702, Laws of 1872) under which the tracks were increased to four and were laid in a subway or cut bounded on both sides by masonry walls which rose to a height of three feet above the surface of the avenue. As soon as the work was completed the tracks were used for railroad purposes and so continued until the state compelled the road to abandon their use and to operate its cars upon the viaduct which was constructed by the state pursuant to ch. 339, Laws of 1892.

Without further reference to the history of the road in that avenue it may be said that prior to the time when the operation of its trains was transferred from the subway to the viaduct it had acquired the right as against the abutting owners to maintain its railroad and run its trains along and over Fourth avenue. (*Fries Case, supra.*)

In 1890 Congress passed an act directing the secretary of war to cause the bridges over the Harlem river to be replaced by other bridges which should be at least 24 feet above the high water of the spring tides. (U. S. Statutes at Large, vol. 26, p. 437.) As defendant's road crossed one of these bridges, compliance with the provisions of this act made necessary a change in the grade of defendant's railroads, and the act provided that such changes should be made as
(252) soon as the necessary legislation could be obtained to authorize a change in the grade of the approaches to the bridge.

About two years later the legislature passed the act already referred to by which it undertook to accomplish the result aimed at by Congress in such a manner as actually to improve the use of the street itself, a part of the scheme being to compel this defendant to operate its road upon a steel viaduct elevated above the ground, thus giving the public the use of the whole of the surface of the street which before was impossible.

This improvement was made by the state for the benefit of the public, the expense of it, by the mandate of the State, being borne by the city and this defendant in equal proportions. What was done by the state and the legal effect of its action upon the rights of this defendant cannot be better

stated than it was by Judge VANN in the *Lewis Case* (*supra*) and so I quote it:

"That structure was not erected by the defendants, but by the state, as appears from the facts already stated. South of 125th street it gave them no facilities which they did not have before. The stone structure of 1872 did away with grade crossings and gave them four tracks, and this is all they have now. The change of grade north of 125th street, in order to cross the Harlem river at the height required by the general government, has no bearing upon the change of grade south of that point. The defendants are liable for what they did but not for what the state did. (*Atwater* v. *Trustees of Vil. of Canandaigua*, 124 N. Y., 602.) The state created a board of experts and required them to make the improvement for the benefit of the public, giving them absolute control with no right on the part of the defendants to let or hinder. The board made the plans and did the work, letting their own contracts, employing and discharging their own men, without supervision or interference by the companies, which did not and could not set the board in motion, for the want (553) of power, if for no other reason. The change of grade in front of the plaintiff's premises was not only for a public purpose, but was wholly in the interest of the public and not for the benefit of the defendants who had no power to prevent it. They simply paid one-half of the expense by the command of the statute, and, hence, under compulsion of law. They are not liable for the acts of the Park avenue board, which was not their agent, but a governmental agency of the state. (*Benner* v. *Atlantic Dredging Co.*, 134 N. Y., 156, and cases cited on page 162.) Their offer in advance to obey the statute did not affect its compulsive force, for obedience was their duty. As was tersely said in the late case, the railroad company 'had no choice left to it. The state intervened and directed that a work, which it had the power to require to be done, should be done, not by the railroad nor even by the city, but by an independent board in the creation of which the defendant had no voice, over whose selection of employes it had no control, with the discharge of whose functions it could not interfere and whose operations it was powerless to prevent.' * * * The statute 'authorized and directed' the defendants to operate their trains on the structure 'when completed.' Accordingly they laid their tracks, at first on the trestle work, which they used for a short time, and then on the steel viaduct, which they have used ever since. In thus using the work of the state they doubtless accepted it as their own, but they accepted it as a completed structure, and did not thereby become parties to the process of construction. Their accept-

ance did not reach back and adopt the previous acts of the state, but the effect was the same as if they had purchased it from the state on the day they commenced to use it."

Although at the time of the decision of the *Lewis* case we accepted as sound the proposition that, when defendant commenced to use the steel viaduct, it started a new trespass upon the rights of the abutting owners for which it could properly be held liable, subsequent reflection persuaded the majority of the court that this was error. The reasoning which seemed to command the latter conclusion was, (554) briefly, that the state, setting about making improvements in Fourth avenue which were to benefit the general public, found defendant in possession of four tracks in the middle of the avenue, with the right to operate its trains upon them, which it was enjoying. The state could not if it would—and probably would not if it could—deprive defendant of its right to operate its trains in the street. But it had the power in the public interest to compel it to run its trains upon a viaduct instead of in the subway. So the state builded the viaduct over the part of the street formerly occupied by the subway and compelled it to stop running its trains in the subway and to run them on the viaduct instead. The state had the power to do these things and all of them, and defendant, having the right to move its trains over the street, which could not be taken away from it, did not lose that right and become a trespasser because it obeyed the command of the statute, which it could not refuse to obey, to operate its trains upon the structure which the state had built.

The plaintiff was injured by the change, as appears from the findings. But who caused the injury? The defendant, which obeyed the command of the statute which it had not the right to resist, or the state, which had the power to make the changes which were made in the street and did make them and then compelled defendant to make use of them? The question admits of but one answer, and that is, it was the state.

When the question was again presented, therefore, as it was in the *Fries case* (*supra*), we attempted to cure the error which we concluded we had made in the *Lewis* case. The opinions in the *Fries* case were written by Judge O'Brien and Judge Martin. In the course of Judge O'Brien's opinion it is said:

"I am unable to perceive any reason why the legislature had not the power to improve the avenue by removing the railroad from the cut to a viaduct, and if the change affected the rental or fee value of the property of an abutting owner having no title to the street, it was but a consequence of the

improvement, for which the railroad was not responsible. The law is well settled in this state that where the property of an abutting owner is damaged, or even his easements
(555) interfered with in consequence of the work of an improvement in a public street conducted under a lawful authority, he is without remedy or redress, even though no provision for compensation is made in the statute. Whatever detriment the improvement may be to the abutter in such cases is held to be *damnum absque injuria.*"

Judge MARTIN states the principle as follows: "It must also be admitted that all the acts of the defendants for which the plaintiff claims they are liable were performed under and in accordance with the direct and express mandate of that statute. That there was no encroachment upon or actual interference with the plaintiff's premises, and that the improvement was made for the benefit of the public, and in a proper manner, are likewise practically conceded. Hence, the broad question presented is whether, in the absence of any statute providing for compensation, the defendants are liable for remote or consequential damages in having performed only such acts as were required by the express provisions of the statute upon works of a public nature, where there was neither negligence nor want of skill, and no direct invasion of any private property of the plaintiff. We think not. In every civilized community controlled by governmental or municipal laws or regulations, there are many cases where the individual must be subjected to remote or consequential damage or loss, to which he must submit without other compensation than the benefit he derives from the social compact."

The judgment was accordingly reversed. That decision was deliberately and carefully made, and reflected the view of a majority of the members of this court at that time, and still does.

The dissenting opinion cited, and correctly, the *Reining Case* (128 N. Y. 157) as authority for the proposition that "while the public authorities may raise the grade
(556) of a street for a street use, or may authorize the construction of a surface railroad on the street, in either case without liability to the abutters, they cannot raise the grade of a street *for the exclusive use* of a railroad without compensating an abutter for the injury inflicted." But that proposition is not involved in this case. Here the state did not authorize a change in the street for the exclusive use of the railroad. The change was made for the public benefit as well as for that of the railroad, and for that reason the state compelled the city of New York to pay one-half of the expense of it.

The decisions in the elevated railroad cases are not in point.

There no attempt was made by the state to improve the street for the benefit of the public. Instead, it granted to a corporation the right to make an additional use of the street, in the doing of which it took certain easements belonging to abutting owners, which it was compelled to compensate them for.

It is again urged on this appeal that the act under which these changes were made is unconstitutional, and hence that defendant need not have obeyed its commands. But that question was considered and passed upon by this court in the *Fries* case, every member of the court, whether voting with the majority or minority, agreeing that the act was constitutional. Judge O'BRIEN said, in discussing the constitutional question: "I think it would be difficult, in view of the authorities cited, to state any ground upon which it can be questioned." And Judge MARTIN commenced his opinion by saying: "Although there is a divergence of opinion among the members of the court as to some of the legal questions involved in this case, yet all agree that the statute under which the acts complained of were performed was valid, and that the legislature did not transcend its powers in enacting it." And Judge CULLEN said: "The statute is not unconstitutional and no decision to that effect is necessary to secure plaintiff's rights."

We still think, under the authority of *Radcliff's Executors* v. *Mayor, etc., of Brooklyn* (4 N. Y. 195) and the other cases cited by Judge MARTIN in his opinion in the *Fries* case, that the state had the power to make this improvement, as
(557) it did, without compensation to the abutting owners.

Undoubtedly the state had also the power to provide in the act for compensation to abutting owners, and to apportion the expense incurred in the acquisition of the easements destroyed upon the defendant and the city of New York, as it apportioned the expenses of building the viaduct and making the other changes in the street; and it still has the power to authorize ascertainment of the damages to the abutting owners through its Court of Claims and to provide for their payment, and it may well be that it would be equitable for it to do so. But that it possessed the power to improve the street, as it did, for the benefit of the public, in the manner that it did, compelling abutting owners to bear so much of the burden of the improvement as resulted from the partial destruction of their easements of air, light and access, we have no doubt. Indeed, if in the judgment of the legislature it had seemed wise and just to do so, it could have assessed a portion of the expense of the improvement upon the abutting owners instead of placing it all upon the defendant and the city.

The judgment should be reversed and the complaint dismissed, without costs.

BARTLETT, J. (dissenting).

This is one of a large number of cases brought against the defendant railroad companies to recover damages for the erection of the steel viaduct in Park avenue, extending from near 106th street to the Harlem river, and over which the defendants operate their railroad with some two hundred trains a day.

The plaintiff recovered three thousand dollars fee damages and fourteen hundred dollars rental damages from February 16th, 1897, to October 10th, 1900, which was the date of the trial. The former date, February 16th, 1897, is the day on which the defendant companies began running their trains. The judgment of the Appellate Division was entered on the 29th day of April, 1901.

The case of *Fries* against these defendants was not decided in this court until December 31st, 1901. (169 N. Y. 270.)

The plaintiff appealed from the judgment on the ground that he was limited in his recovery by an improper rule
(558) as to the measure of damages, the court holding that he was not entitled to recover damages prior to February 16th, 1897, the day the steel viaduct was completed.

The counsel for the defendants also appeals, contending that our decision in the *Fries* case is conclusive as to all questions presented in the case at bar, and nothing remains to be decided.

The counsel for the plaintiff attempts to distinguish these cases as follows: (1) That in the *Fries* case there was a finding that the defendants had "acquired the right, without liability to the plaintiff, to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16th, 1897," and in the case at bar there is no such finding; (2) that Fourth or Park avenue, in front of the premises in suit, was a public street prior to the defendants' entry into the same.

(The premises involved are situated at the northwesterly corner of Park avenue and 115th street, and the viaduct structure of iron and steel in front of these premises is about 59 feet wide, and consists of four tracks laid on a steel structure, having a mean elevation of about 31 feet above the surface of said avenue. Prior to the erection of this viaduct, the tracks in the subway were at the south line of the plaintiff's premises, about level with the surface of the avenue, and at the north line about five and one-half feet below it. This subway was completed and trains began to be operated in it in 1878); (3) that in the *Fries* case the act of 1892 was assumed to be constitutional, and in this case its constitutionality is controverted; (4) that the rule of *damnum absque injuria* has no application to this case.

The plaintiff contends that Fourth avenue was a public

street at the time the Harlem Railroad Company, which is the lessor of the Central and Hudson, was organized.

Twenty-four feet of Fourth avenue, as it was then called, in front of the premises in question, were conveyed to the city July 24th, 1827, by Poillon.

In January, 1832 (the Harlem Railroad Company having been incorporated in 1831), Poillon conveyed to the
(559) Harlem Railroad Company 24 feet in Fourth Avenue, but at that time he had nothing to convey; he also refers in that conveyance to, and sanctions the map of New York, filed by the commissioners in 1811 under the act of 1807.

So far as these premises are concerned, it would seem as if the only right the Harlem Railroad Company acquired in the street, if any, was a prescriptive one, that would be no broader than its actual occupation. (*Lewis Case*, 162 N. Y., 202.)

It is true that Poillon's deed to the city was never recorded, but this was not essential in order to create a highway. (*Driggs* vs. *Phillips*, 103 N. Y., 77). Furthermore, the Harlem Railroad Company could not be regarded as a purchaser in good faith and for a valuable consideration, and under the provisions of its charter and its agreement with the city, and the ordinance of the board of aldermen following the agreement, it would seem to have entered upon Fourth Avenue under all the restrictions in these various documents contained, and was in no sense the exclusive owner of the fee of the street, getting title from a private grantor.

The charter of the company is found in the Laws of 1831. The agreement bears date January 9th, 1832, and the ordinance was passed by the board of aldermen on January 20th, 1832.

In less than twenty years after any of these dates the city began condemnation proceedings to widen Fourth Avenue, which was then 100 feet wide, and it was proposed to add twenty feet on each side, which was condemned, and the 100 feet, representing the old street, was marked "ceded." It does, however, appear in some of these litigations that a decree of condemnation went in form against the Harlem Railroad Company as to the portion of the street occupied by it, declaring a condemnation in consideration of one dollar. This report was confirmed sometime in the year 1850.

The changes in Fourth Avenue, as it was then called, and the railroad structure under the act of 1872, resulted in a new state of affairs as to the grade of the tracks, both on viaducts
(560) and in cuts, which were not completed until 1878. It, therefore, follows that the contention of the defendants, as to undisputed title in the avenue, in front of the plaintiff's premises, cannot be maintained.

The claim that the act of 1892 is unconstitutional cannot be sustained.

If it be true that the defendants have no legal right, by reason of grant or prescription, to erect this steel viaduct to the height of 31 feet in front of the premises in question, the effect of the act of 1893 is simply, as in the elevated railroad cases, to authorize the construction of this viaduct structure in the avenue, subject to the rights of abutting owners, to the extent that their easements of light, air and access have been invaded.

The mere fact that the act does not provide for compensation has no controlling effect. The legislative sanction to construct what would otherwise be a nuisance in a public street does not imply the power to take the easements of abutting owners, which are property, without compensation.

The fundamental error in the *Fries* case is the assumption that the doctrine of *damnum absque injuria* is applicable.

In the prevailing opinion in that case the learned judge said: "So we have the case of a change of grade in a street, which necessitated a change in the location of the railroad tracks, all made under a valid statute, and that alone is said to constitute the alleged trespass."

If this statement was correct, it would be too clear for argument that the doctrine of *damnum absque injuria* would apply to this case.

The fact is that there was no change of the grade in Park Avenue. The title of chapter 339 of the Laws of 1892 reads: "An act to regulate, improve and enlarge Park Avenue above 106th Street in the city of New York, and providing for the passage of intersecting streets, under the railroad structure of the New York and Harlem Railroad Company, *and for the elevation of said railroad structure, and for changing the grade of said railroad,*. and for the construction of a
(561) new railroad bridge at an increased elevation over the Harlem river, and providing for all changes in any avenues, streets or railroads that may be necessary *by reason of such change in structure and grade and increased elevation of bridge*, and for other purposes."

It is profitable at this point to consider in detail the history of this act.

The Federal government determined to raise the height of the bridge which was in use by the railroad companies The State of New York, as in duty bound, passed this act in question to carry out the change which Congress had decided should take place.

This act in brief directed that the grade of the Harlem Railroad Company's track should be raised between 106th Street and the Harlem river. This was done in order to accommodate it to the new bridge.

The mayor of the city of New York was authorized by sec-

tion thirteen to appoint a board to be known as "The Board of the Park Avenue Improvement above 106th Street," whose duty it was to execute contracts and superintend the construction of said improvement. Upon the completion of the work the counsel to the corporation of the city of New York was required by section sixteen to apply to the Special Term of the Supreme Court in the first department for the appointment of commissioners to determine the area of assessment to raise money to pay for the bonds to be issued by the city in payment of its share of the work.

The act provided that the city of New York should pay one-half and the railroad company the other half of the cost of this work if it did not exceed a million five hundred thousand dollars; if it exceeded that amount the railroad company was to pay the entire excess.

As I understand the *Fries* case, the majority of the court held (1) that this was work of a public nature, and that the railroad company was not liable for injury to the easements of light, air and access unless there was a want of skill, or (562) negligence, in the performance of the work; (2) that the principles of law relating to the change of grade of streets, when lawfully made, are applicable to this situation, and that the doctrine involved in the elevated railroad cases has no application.

The act upon its face shows that the legislature did not consider it was providing for a public work for which the state was to be liable. The provision that a small portion of the city and the railroad company shall pay between them the cost of this work, and if it exceeded a certain sum the excess should be paid by the railroad company, is conclusive evidence that it does not contemplate a public work, inflicting damages which can only be recovered under a special provision of law, or by showing negligence or want of skill in the performance thereof.

The raising of the bridge by act of Congress contemplated, it is reasonable to suppose, the making of the navigable tide waters of the Harlem river accessible to vessels of greater draught, with taller masts and smokestacks, thereby benefiting the city of New York and incidentally the great railroad corporations using this bridge, they being interested in the growing prosperity of the municipality and the improved facilities for entering the city of New York by land and water.

These considerations and the details of the act already referred to, lead me to the conclusion that this work was not of the character assumed by the prevailing opinions in the *Fries* case. If it were of that character, then it was unjust, and even unconstitutional for the legislature to have imposed

any portion of the cost of this work upon the railroad corporations and a small section of the city of New York included in an area of assessment to be fixed by commissioners.

We thus have a situation presented similar to that in the elevated railroad cases, to wit: An elevated structure in the center of a public street, extending in places to the height of thirty-one feet, for the express purpose of elevating the railroad tracks so as to connect with the new bridge.

In my opinion to hold that the act of 1892 provides for raising the grade of Park avenue, is judicial legislation,
(563) and introduced in the *Fries* case a fact not disclosed by the act itself, and not discussed at our bar when that case was argued.

These cases present a situation covered by the case of *Reining* v. *N. Y., L. & W. Ry. Co.* (128 N. Y. 157). While the case cited does not present facts similar to the one at bar, yet the principle involved is precisely the same.

It was there held that a municipality could not, under the guise of exercising the power to alter the grade of a street, appropriate a part of the street practically to the exclusive use of a railroad company and cut off abutting owners without compensation from using any part of it in the accustomed way. In other words, this was a limitation of the power of the common council conferred upon it by the legislature in the city charter of Buffalo.

Judge ANDREWS, in applying the law of elevated railroad cases, as laid down in the *Story* case, said: "It is no longer open to debate in this State that owners of lots abutting on a street, the fee of which is in the municipality for street uses, although they have no title to the soil, are nevertheless entitled to the benefit of the street in front of their premises for access and other purposes, of which they cannot be deprived except upon compensation."

It was expressly held in the case cited that the erection of an embankment in the street, and running parallel therewith, and occupied by a railroad company, was not a change of the grade of the street.

That the legitimate change of the grade of a street, to the damage of abutting lot owners, is damage without injury, is the settled law of this state, but it involves a principle that has been condemned in many jurisdictions, and the hardship of which has been cured in some of the states by constitutional amendment providing for the payment of such damages. It is a doctrine which ought not to be extended.

I am of opinion that the law controlling the elevated railroad cases is applicable here, and that the decision in the
(564) *Fries* case reversed a rule of property under which millions of dollars have been paid out by the elevated

railroad companies to abutting owners who had no title to the street.

The New York and Harlem Railroad Company is not vested with any title in Park avenue that permits it as the owner of real estate to erect this elevated structure without regard to the injury it may work upon the easements of light, air and access enjoyed by abutting owners. They must settle for damages caused by so much of the structure as exceeds established user.

In several of the cases now before us it appears that the city received a conveyance of the fee before the railroad company took the deeds from grantors, who practically had nothing to convey. In another case there is a title under condemnation proceedings against an infant in 1830, presumably securing to the railroad company the right to operate its road on the strip twenty four feet wide.

The details of the railroads' title were carefully and elaborately examined in the *Lewis Case* (*supra*).

I am of opinion that this invasion of the easements of abutting owners has vested in them a valid claim against the railroad company, and if this court adheres to its decision to the contrary, on the ground that it was a public work ordered by the state, then these damages are a valid claim against the state.

I have no disposition to urge, unduly, the reconsideration of the principles of law laid down in the *Fries* case. I understand that the court desires a full and free discussion of this entire question. I shall be content, if a result is reached in these cases adverse to the plaintiff, so long as I place myself on record as dissenting, on the ground that it reverses the *Lewis* case and adopts a principle that is at war with the long line of decisions in the elevated railroad cases and the established law of the state.

If this judgment is reversed it should be without costs.

I vote for affirmance.

CULLEN, *J.* (dissenting). I concur in the opinion (565) of Judge BARTLETT and dissent from the decision about to be made. I feel that I am not precluded from taking this course by the previous decisions of this court, for against the authority of the *Fries* case may be fairly set off that of the *Lewis* case. But the court having on this appeal re-examined the whole question involved in both the cases cited, and determined that the plaintiff is not entitled to compensation for the injuries to his property complained of, I must hereafter subordinate my judgment to that of the majority, and shall regard subsequent discussion of the question as foreclosed by the action of the court in the present case.

HAIGHT, MARTIN and WERNER, *JJ.*, concur with PARKER,

Ch. J.; BARTLETT, *J.*, reads dissenting opinion, and CULLEN *J.*, concurs in memorandum; GRAY, *J.*, not sitting.

Judgment reversed, etc.

Court of Appeals.

JOHN KEIRNS, Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY, *et al.*, Appellants.
} 173 N. Y., 642.

Argued November, 1903; decided February, 1903.

Per Curiam.—Judgment reversed and the complaint dismissed, without costs, upon the authority of *Fries* v. *N. Y. & Harlem R.R. Co.* (169 N. Y., 270), and *Muhlker* v. *N. Y. & Harlem R.R. Co.* (173 N. Y. 549).

VANN, *J.* (concurring):

The plaintiff's property is in the next block to that in which the property of the plaintiff in the *Lewis* case was situated. (*Lewis* v. *N. Y. & Harlem R.R. Co.*, 162 N. Y. 202.) The essential facts of the two cases differ in no particular that would prevent a recovery in one unless they would also prevent a recovery in the other. Since the decision of the *Lewis* case, however, the *Fries* case has been before us, in which a new point in the litigation was discovered by a majority of the court that was not raised by counsel or considered by us in the former case. (*Fries* v. *N. Y. & Harlem R.R. Co.*, 169 N. Y. 270.)

The *Lewis* case was argued and decided upon the theory that the entry of the railroad company into Park avenue was in subordination to the legal title of the city; that by user for more than twenty years the company obtained by prescription as against the abutting owners the right to maintain a permanent structure within the same limits and at the same height as previous structures, and to the extent of the com-
(643) pany's user for twenty years acquired the exclusive right to interfere with the easements of light, air and access; that the railroad company could not be charged with the damages which the easements of the abutting owners suffered from the construction, itself, by a governmental agency, of the last structure, but that when the defendants used it they became liable from that time for such damages as the easements suffered from such user to the extent of the increased height of the third structure, after deducting the benefits received from increased facility of access.

On the other hand, the *Fries* case was decided upon the theory that, as against the abutting owner with no title to the avenue, the state had the right to require the grade upon which the railroad was run to be changed; to cause to be

erected a steel viaduct, and to compel the defendants to run their trains thereon, and in the absence of any statute providing for compensation, that they were not liable for remote or consequential damages sustained by the abutting owners.

This point, although radical, was entirely new, and had it been raised in the *Lewis* case might have resulted in a reversal instead of an affirmance. While the judgment of the court in that case was by the unanimous vote of all the judges who sat, and the judgment in the *Fries* case was by a bare majority, and while I regret the result reached in the latter as amounting to the confiscation of property belonging to abutting owners, and a gift thereof to railroad corporations, I now yield to it as establishing the law of the state, since the principle upon which it rests has been sanctioned and applied in another case by this court. (*Muhlker vs. N. Y. & Harlem R. R. Co.*, 173 N. Y., 549.)

I concurred in the dissenting opinion of Judge Cullen in the *Fries* case and should have concurred in that of Judge Bartlett in the Muhlker case had I sat when it was argued, but I regard the question as now settled, and by the rule of *stare decisis* I am compelled to vote for reversal.

PARKER, *Ch. J.*, BARTLETT, HAIGHT, MARTIN and WERNER, *JJ.* (and VANN, *J.*, in memorandum), concur; GRAY, *J.*, not sitting.

Judgment reversed, etc.

Court of Appeals.

HEDEWIG KRIETE, Respondent,
against
THE NEW YORK AND HARLEM RAILROAD COMPANY, *et al.*, Appellants.

175 N. Y., 484.

Argued May, 1903; decided June, 1903.

Per Curiam:

We decide on authority of the *Fries Case* (169 N. Y., 270), and the *Muhlker Case* (173 N. Y., 549), that under the statute requiring the structure complained of the plaintiff has no remedy against this defendant.

The constitutionality of the statute being questioned, we hold (1) that it does not violate the State Constitution, (2) that it does not offend against that provision of the 14th amendment of the Federal Constitution providing that a person shall not be deprived of property without due process of law, and (3) that it does not contravene section 10 of article 1 of the Federal Constitution forbidding the impairment of the obligation of a contract.

The judgment should be reversed and the complaint dismissed, without costs.

PARKER, *Ch. J.*, O'BRIEN, HAIGHT, MARTIN, CULLEN and WERNER, *JJ.*, concur; GRAY, *J.*, not sitting.

Judgment reversed, etc.

Court of Appeals.

NORA DOLAN *et al.*, Respondents,
v.
THE NEW YORK AND HARLEM RAILROAD COMPANY *et al.*, Appellants, Impleaded with *Another.*
} 175 N. Y., 367.

Argued May, 1903; decided June, 1903.

HAIGHT, *J.*:

This is one of a group of actions brought by the abutting owners on Park avenue in the city of New York to restrain (368) the maintenance and operation of the defendants' railroads upon the viaduct structure through that street, or, as an alternative, to recover damages resulting to the fee and rental value of the premises.

The plaintiffs' premises are situated on Park avenue, between 124th and 125th streets, abutting upon the de- (369) fendants' railroad stations at 125th street. The station is upon the viaduct structure, widened out so as to provide a suitable platform on which passengers may enter or alight from trains, and is reached by stairways from the street.

The complaint in this action demands judgment that the defendants be enjoined from maintaining a station, platform and appurtenance thereto in front of the plaintiffs' premises, as well as that of the elevated railroad structure. The trial court awarded judgment in favor of the plaintiffs for fee and rental damages, which included the damages suffered by reason of the operation of the defendants' trains upon the viaduct. For this reason the judgment must be reversed, upon the authority of *Muhlker* v. *New York & Harlem Railroad Co.* (173 N. Y. 549) and *Fries* v. *New York & Harlem Railroad Co.* (169 N. Y. 270). The only question remaining to be determined upon this review is as to whether the complaint should be dismissed or a new trial granted, and the determination of that question involves an inquiry as to whether the plaintiffs can recover damages by reason of the construction and maintenance of the defendants' depot at that place.

Prior to 1892, the defendants had acquired the right to maintain and operate their railroad through Park avenue in a subway or cut bounded on either side by walls of masonry. This not only prevented the use of a large portion of the street for municipal purposes, but it also seriously interfered with the passage of teams between those portions of the city

lying on opposite sides of Park avenue. Under these circumstances the legislature enacted chapter 339 of the Laws of 1892. By this act a board was created to erect a steel viaduct through Park avenue from 111th street to the Harlem river, and after its completion the defendants were required to run their trains over the viaduct. The cut in 125th street was then required to be filled, and the surface paved.

(370) The evident purpose of this legislation was to open up Park avenue as a street through its entire width, and to facilitate travel across the same between the portions of the city lying on either side of the street. This was a public improvement effected through a governmental agency, over which the defendants were given no voice or power to control the operations of the board. It was consequently held in the cases to which we have referred, that the defendants were not liable for the damages resulting to abutting property owners from the operations of their trains on the viaduct. The same statute further "authorized and permitted" the defendants, at their election, to erect station houses on both sides of the railroad at 125th street with platforms extending from the north line of 124th street to the south line of 125th street. This statute was amended by chapter 594 of the Laws of 1896, in which the defendants were not only authorized but *directed* to erect and maintain such stations, specifically specifying the size, place and character of the structure.

It is contended on behalf of the defendants that inasmuch as they were compelled to construct the stations, under the amendment of the act, they are relieved from liability for damages to abutting owners of property, upon the same theory and for the same reasons that they have been relieved from liability for the construction of the viaduct. But we think there is a controlling distinction between this and the former cases, and that our decisions in the *Fries* and *Muhlker* cases have no application. In those cases, as we have seen, the government built the structure for the purpose of effecting a great public improvement. In this case the government requires the defendants to provide suitable and proper facilities to enable their patrons to safely and conveniently enter and alight from their trains. A railroad corporation in accepting a charter from the state impliedly undertakes to afford reasonable and proper facilities for the transportation of passengers and freight, and if it neglects it may be compelled to discharge its duty in this regard. Under the General Railroad Law the construction and maintenance of depots is committed to the judgment of the railroad commission-

(371) ers, who are empowered to direct as to the station houses and terminal facilities that shall be provided.

Under the amendment of 1896 the legislature, so far as these defendants are concerned in Park avenue, has superseded the railroad commissioners, and has by act specified the character, size and location of the stations, and that is all. To our minds the situation is not different from that which would be presented if the railroad commissioners had required a depot and terminal facilities at any other point upon the defendants' lines. If, in complying with such requirements, additional land should be required, it would become the duty of the railroad company to acquire the same and pay therefor. So in the case under consideration. If the station houses occupy more of the street than the viaduct and tend to deprive the plaintiffs of their easements of light, air and access, we think the defendants should pay therefor. The station houses are not constructed by the government for the purpose of accomplishing a public improvement, but are required by the government to be constructed by the railroad companies, under their implied contract with the state, to afford suitable and proper facilities for the accommodation of their own patrons.

While no damages could be awarded by reason of the construction of the viaduct, or of the operation of the trains of the defendants thereon, both fee and rental damages may be awarded, if suffered in consequence of the station houses. We consequently conclude that a new trial should be ordered.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

PARKER, Ch. J., O'BRIEN, MARTIN, CULLEN and WERNER, JJ., concur; GRAY, J., not sitting.

Judgment reversed.

Court of Appeals.

AUGUSTA A. KETCHAM, Respondent,
vs.
NEW YORK AND HARLEM RAILROAD COMPANY, *et al.*, Appellants.

177 N. Y., 247.

Argued January, 1904; decided January, 1904.

BARTLETT, *J.*:

This action is brought to recover fee and rental (248) damages of the defendants by reason of the erection of their passenger station at 125th street in the city of New York. The plaintiff's premises are situated on the southwest corner of Park avenue and 126th street, being a plot of seventy-five feet on Park avenue and ninety feet in depth, upon which are erected one-story buildings used for stores, said premises being known by the street numbers 1834, 1836 and 1838 Park avenue. The 125th street

station extends north to 126th street and is consequently in front of plaintiff's premises.

The plaintiff, according to the prayer of her complaint, seeks to perpetually enjoin the defendants from maintaining, continuing or using the elevated railroad structure and its appurtenances and the station, station platform, stair-
(249) ways and appurtenances, tracks, switches, ties, stringers, girders and rails in front of, over or adjacent to plaintiff's said premises, and that defendants be required forthwith to remove said railroad structure, etc., unless the defendants pay to the plaintiff such sum or sums as may be found to be the value of the easements of which the plaintiff has been deprived.

The trial court found (finding IV) that the defendants erected a passenger station at 125th street and Park avenue, a solid iron structure, in front of the plaintiff's premises, which was eventually modified so as to be eighty-two feet wide and twenty-three feet and three inches high.

Finding V reads: "By the adoption of plans for the station, and by the increase of the width and alteration of the structure for the sole purpose of accommodating the station, and by the work done by the defendants themselves or by their contractors, the defendants became parties to the process of construction at this point of the station buildings and appurtenances from the time of the commencement of the work in August, 1893, to its completion in November, 1897."

Finding IX reads: "The plaintiff has suffered damages by reason of the increase of inconvenience from the operation of trains *upon the viaduct structure* since the 16th of February, 1897, not including that from noise, and in the erection and maintenance of a passenger station at 125th street, *and the passing, starting and stopping of numerous trains thereat*, in the depreciation of the value of fee of her real estate in the sum of $11,500, and in the loss of rents from the 16th of February, 1897, down to the date of trial, in the sum of $5,500; the said sums * * * represent as to fee damages and rental damages, respectively, the net difference measured in money between the physical effect of the *former operation of the railroad* upon the premises in suit and the physical effects *produced by the new elevated structure, including the station and its appurtenances* and its use, less benefits conferred upon the same premises by reason of increased traveling facilities and increased traffic."

As this case is one of a large number involving the
(250) same situation, it is deemed proper to state what this court has already decided and to point out the one question which has been left open.

This court has decided that the steel viaduct in Park avenue, upon which the defendants' railroads are now operated, ex-

tending from 104th street to the Harlem river, was a public improvement effected through a governmental agency, and that defendants were not liable for damages resulting to abutting property owners from the maintenance of the structure or the operation of trains thereon. (*Muhlker* vs. *N. Y. & Harlem R.R. Co.*, 173 N. Y., 549; *Fries* vs. *N. Y. & Harlem R.R. Co.*, 169 N. Y., 270.)

It has also been decided "that the station houses are not constructed by the government for the purpose of accomplishing a public improvement, but are required by the government to be constructed by the railroad companies under their implied contract with the state to afford suitable and proper facilities for the accommodation of their own patrons." (*Dolan* vs. *N. Y. & Harlem R.R. Co.*, 175 N. Y., 367.)

A single question is presented by this appeal, the defendants, appellants, contending that the findings of the trial court include, not only the damages, fee and rental, arising from the construction of the station at 125th street, but embrace damages produced by the new elevated structure, including the station and its appurtenances.

The plaintiff insists that, reading the fifth and ninth findings together, it is clear that the trial court limited the damages to the construction and operation of the station.

We are of opinion that the contention of the appellants must be sustained, as it seems to us clear, on a careful reading of the findings, that the trial court did not confine its award of damages to the erection and maintenance of the station building and appurtenances.

Finding IX distinctly states that the plaintiff "has suffered damages by reason of the increase *of inconvenience from the operation of trains upon the viaduct structure* since the 16th of February, 1897, not including that from noise, *and* in the erection and maintenance of a passenger station at
(251) 125th street, and the passing, starting and stopping of numerous trains thereat."

This finding further states, after fixing the fee and rental damages, that they represent "the net difference measured in money between the physical effect of the *former operation of the railroad upon the premises in suit and the physical effects produced by the new elevated structure, including the station and its appurtenances and its use, less benefits conferred upon the same premises by reason of increased traveling facilities and increased traffic.*"

It is clear from the phraseology of this finding that the trial court did not confine the assessment of damages to the station and its appurtenances, but considered the former operation of the railroad upon the premises in suit and the physical effects

produced by the new elevated structure, including the station and its appurtenances.

In *Dolan* v. *N. Y. & Harlem R.R. Co.* (175 N. Y., 367), Judge HAIGHT, writing for the court, said (p. 371): "If the station houses occupy more of the street than the viaduct and tend to deprive the plaintiffs of their easements of light, air and access, we think the defendants should pay therefor."

This language is, in general terms, an indication of the rule of damages to be applied in these station-house cases which have survived the former decisions of this court. It is desirable that the rule should be clearly stated for the guidance of counsel in the trial of similar cases.

If the plaintiff proves that the steel viaduct has been extended beyond the width of the structure between stations, and is clearly a part of the work necessary in erecting the station, and an injury is established by reason thereof, proper damages should be awarded.

The judgment appealed from should be reversed and a new trial ordered, with costs to abide the event.

PARKER, Ch. J., O'BRIEN, HAIGHT, MARTIN and CULLEN, JJ., concur; GRAY, J., not sitting.

Judgment reversed, etc.